CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 22, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

VOL. II.

INDEX.

	Original	Print
Testimony of John H. Muller	808	561
Rochester H. Rogers	818	567
Marion H. Forchheimer	823	570
Harry H. Bernstein	829	573
Wilbur L. Cummings	852	585
Wm. W. Gardiner (recalled)	931	629
Evan T. Fisher	935	631
Charles H. White, Jr.	985	659
Martin E. Goetzinger	1003	669
Henry E. Worcester	1031	685
Wm. H. Hoodless	1052	696
Louis R. Campiglia	1066	704
Paul M. Ripley	1094	719
Stipulation to eliminate production of expert evidence on question of transiting	1128	737

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1935.

—6812-C

	Original	Print
Testimony of Fred G. Taylor	1198	773
Evan T. Fisher	1213	782
Fred G. Taylor (recalled)	1214	782
Joseph F. Abbott	1222	787
Louis R. Campiglia (recalled)	1262	807
Hans C. Petersen	1280	817
Martin E. Goetzinger (recalled)	1286	821
Louis V. Place, Jr.	1296	827
John W. Lowe, Jr.	1337	849
Stipulation re testimony of Morton Myers re Exhibit "U-4"	1341	851
Testimony of V. K. Raymond	1342	851
Charles H. White (recalled)	1362	861
Charles B. Castle	1379	870
Evan T. Fisher (recalled)	1385	874
Frank E. Sullivan	1402	881
Fred G. Taylor (recalled)	1421	891
Lambert V. B. Cameron	1437	899
Form of application used by National Brokers' Ass'n, year 1927	1443	902
Testimony of Evan T. Fisher (recalled)	1445	903
Louis V. Place (recalled)	1452	907
Fred G. Taylor (recalled)	1460	911
Evan T. Fisher (recalled)	1471	917
Fred G. Taylor (recalled)	1487	925
Charles B. Castle (recalled)	1490	926
Louis V. Place (recalled)	1499	931
W. D. Flintom	1544	956
Charles H. White (recalled)	1555	961
Charles B. Castle (recalled)	1572	970
Fred G. Taylor (recalled)	1579	973
Evan T. Fisher (recalled)	1592	981
Fred G. Taylor (recalled)	1604	987
John L. Many, Jr.	1611	991
John W. Symons, Jr.	1631	1002
Francis E. Kamper	1637	1005
Charles Duncan	1641	1008
Fred G. Taylor (recalled)	1647	1011
Louis V. Place (recalled)	1662	1018
Fred G. Taylor (recalled)	1673	1024
Charles B. Castle (recalled)	1676	1026
J. Henry Lienau (recalled)	1679	1027
Fred G. Taylor (recalled)	1683	1029
Mark W. Lowe	1689	1032
Pedro P. Polakoff	1691	1033
Wm. E. Foster	1693	1034
Martin E. Goetzinger (recalled)	1713	1044
Mr. Fisher	1721	1048
Martin E. Goetzinger (recalled)	1722	1049
Walter C. Pitner	1724	1049
Hugh Dawson	1726	1051
Joe E. Carter	1728	1052

	Original	Print
Testimony of Ophel W. Gates	1731	1053
Walter L. Lefew	1732	1054
R. Fleming Johnson	1734	1055
Leonard C. Adams	1736	1056
LeRoy Moore	1738	1058
Austin Whitener	1739	1059
James H. Post	1740	1059
Charles B. Castle (recalled)	1748	1064
Alfred H. Munch	1753	1066
Ralph S. Stubbs	1765	1073
Wilbur L. Cummings (recalled)	1778	1079
Excerpt from report of Federal Trade Commission on sugar supplies and prices, November 15, 1920	1781	1082
Testimony of Charles B. Castle (recalled)	1788	1088
Edgar H. Stone	1792	1090
Wm. H. Harper	1799	1093
John H. Ketcham	1801	1094
John W. Lowe	1809	1099
Arthur B. Wollan	1810	1099
Paul M. Ripley (recalled)	1819	1104
Stipulation re testimony of Thomas J. Gallagher and Arthur Weidener	1822	1105
Stipulation re testimony of Charles B. Castle and Samuel Kerwin	1828	1109
Stipulation re certain testimony of representatives of fifteen defendant refiners	1831	1111
Testimony of Evan T. Fisher (recalled)	1843	1117
Stipulation re Exhibit "E-17"	1844	1118
Testimony of Edwin R. A. Seligman	1855	1125
Rudolph Spreckels	1894	1147
Stipulation re testimony of Alfred H. McCausland	1894	1147
Testimony of Fred G. Taylor (recalled)	1897	1149
Louis V. Place (recalled)	1902	1151
Thomas S. Adams	1912	1157
Order approving statement of evidence	1933	1168
Stipulation as to accuracy of narrative statements	1935	1169
Statement of points to be relied upon and designation of parts of record to be printed	1937	1170
Designation by appellee of additional parts of record to be printed	1939	1170

Petitioner's Exhibit 315 was received in evidence.

Cross-examination.

By Mr. Peck:

Wortz, after whom the companies are named, is the principal stockholder in the biscuit company and the storage company. The stockholders of the biscuit company are 100% stockholders of the storage company, with one exception.

The 2 buildings have been connected by an over-head tunnel ever since the existence of the storage company. During the time that the storage company was storing for the refiners their sugar was stored in one building while the sugar for the biscuit company was in another. Doebel, office man of the biscuit company as well as the storage company, kept the records for the storage company and part of the records for the biscuit company. The records [fol. 807] of the storage company were kept in Wortz' private office which was in the biscuit company's building. The delivery orders for the Wortz Storage Company to the refiner, advising of withdrawals, are made out by Martine Buergler, stock man for both the biscuit and storage companies. His record is turned over to Doebel who would then make out his official record and send it to the refiner. Buergler had charge of the deliveries out of the sugar and also had charge of the receiving end for the biscuit company.

I got the idea we had been barred by the Institute because Henderson, through their broker, had advised me they would have to discontinue and I am sure that I received the notice prior to the talk with Godchaux' broker.

Prior to that time, the biscuit company was buying American, Henderson, Colonial, C. & H., Gay & Sullivan and any sugar on which the market was right. After that we bought the sugar the same way. We bought Godchaux and other sugars at the same time.

The Wortz Storage Company was organized in 1929. Prior to that time we did not operate a storage company.

[fol. 808] JOHN H. MULLER was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am manager of the Trans-Marine Corporation located at 44 Whitehall Street, New York City. The company is engaged in barge canal freighting and operates principally between New York and Buffalo. We make stops at such intra-state ports as Syracuse and Rochester. In 1928 we operated 40 barges, each barge having a capacity of 8,000 to 10,000 bags of sugar to a load.

Prior to 1929 we handled sugar for both refiners and purchasers. In 1928 the barge rate on sugar was 18¢ a hundred pounds, from the refinery at New York to Buffalo. This allowed the refiner 25¢ a ton to load and stow the barge in a proper manner and included delivery on the dock, in the cars or in the warehouse at Buffalo. If an individual consignee desired to load and discharge the barge himself, we subtracted the amount of that cost from the 18¢ rate and let him handle it. We did business with Edgar on that basis. We had a different rate for sugar shipped from New York by barge to Buffalo and for transfer by barges to the Great Lakes. That rate was 14¢ which would be called the proportional rate to Buffalo. The all-rail rate from New York to Buffalo on this class of mer-
[fol. 809] chandise, which is fifth class, is 32¢.

In 1922 we	handled	28,000	bags	of	sugar.
1923 "	"	4,000	"	"	"
1924 "	"	8,000	"	"	"
1925 "	"	30,000	"	"	"
1926 "	"	372,000	"	"	"
1927 "	"	1,056,000	"	"	"
1928 "	"	1,130,000	"	"	"

Our largest customer was W. H. Edgar & Son and other large customers were National, American and Federal.

For larger shipments we changed our rate to what we called "volume tonnage". In 1927 or 1928 our volume tonnage rate with Edgar was 12.5¢ a hundred, free of all handling. He paid the refiner 25¢ a ton to stow the boat and paid the cost of discharging the barge at Buffalo, or if it went over-side ship to the Great Lakes Transit Company, he absorbed that handling charge or paid it to Great Lakes Transit Company. Our rate was net to us. If it was local

consignment to Buffalo, Edgar would ask us to do the labor and in that case our rate was 18¢. In 1928 approximately 75% of the tonnage we handled was sugar.

In 1927 our net profits before depreciation and interest on all commodities shipped by our barges were $97,000. In 1928 they were $101,00 and in 1929 were $4,000.

Edgar was our principal customer and in the early spring of 1929 I made an oral contract to transport considerable sugar during the year. It provided I was to hold myself [fol. 810] in readiness to furnish barges for sugar during the entire season. He said he would increase substantially the tonnage he had given me the previous year and that I should have every barge available that I could give him. In 1928 I handled 38,000 tons of sugar for Edgar, substantially 50% of all my tonnage. All of our 40 barges were not loaded to capacity during the whole season of 1928. Each barge had a capacity of 8,000 to 10,000 bags and would make 7 round trips a season, so that we handled about 150,000 tons. That meant that 33% of our capacity was used to transport sugar.

During April we loaded every barge we had. Of the 40 barges 30 were filled with sugar and of the 30, 27 were Edgar's. After April I did not get tonnage in the volume I anticipated. We handled the following amount of sugar:

	1928	1929
April	46,400 bags	187,910 bags
May	87,665 "	14,795 "
June	120,381 "	37,290 "

I learned that Edgar's business was starting to fall off so I went to see some of the refiners. Carling of Arbuckle in April, 1930, told me he was selling sugar in Rochester on an f. o. b. basis and absorbing the difference between the lowest canal rate and the rail haul. I told him I thought he would go broke doing that. I told him our rate was 18¢ [fol. 811] into Rochester and that that saved the man 10¢ upon the freight application.

Ripley of American and Raymond of National told me that they were going to sell in Rochester on a basis of f. o. b. refinery plus the rail rate.

I saw Carling again and he told me Arbuckle's basis had been changed to that of the other refiners. Each told me that he had to notify the Institute of these changes and

that the Institute in turn sent out this information to brokers and everybody else in the business.

After April 30, 1929, Toddy Company of Rochester, manufacturers of a chocolate drink, advised us that they had routed 500 barrels of sugar to Rochester. We were instructed to pick up the barrels at Pier 6, New York City, or as close as possible to National's refinery in Long Island City.

I called up the traffic manager of National and asked him if he would truck this freight to Pier 6. He informed me that he could not do it because of the declaration they made to the Institute and that they had to abide by the rules of the Institute. I said I could not see why they should refuse to truck the sugar down to this Pier in view of the fact they made deliveries to local sellers of sugar in Long Island City, free truck delivery. He characterized my proposal as a subterfuge to get around the rules of the Institute. I did not receive the shipment. [fol. 812]

After April 30, 1929, the Vernor Company in Detroit, manufacturers of a ginger-ale drink, had shipments made by our Line. We picked up half a barge load and transferred it at Buffalo to the Detroit & Cleveland Navigation Company, a lake transportation line running from Buffalo to Detroit. The through-rate on the consignment was 34¢. We received a prepaid bill of lading so we sent the freight bill to National who paid us 34¢.

In Detroit I received a complaint from the Vernor Company because National, in invoicing the sugar, had charged the freight application on a rail delivered basis although this shipment had been ordered via our Line at the 34¢ rate. The Vernor people told me they refused to pay the difference and had deducted it from the invoice. I took the matter up with Raymond but he said that Vernor had to pay the difference.

I learned afterwards that National billed the purchaser for the difference. Raymond said that sugar had been sold according to their announced terms and conditions on an f. o. b. refinery basis, rail delivered price, and they had to live up to that on account of the Institute.

On March 7, 1930, we attended an Institute meeting held for the purpose of stabilizing rates, terms and conditions for the handling of sugar by the New York State Barge Line system. The sugar interests were represented [fol. 813]

by 8 or 9 persons and the canal interests by the same number.

Taylor of the Institute said that it was extremely desirable that rates and conditions be stabilized for water transportation; that the refiners had pointed out that different canal lines were naming different terms and cutting each other's rates; and that this was extremely detrimental to the sugar interests who preferred stabilized or fixed rates, terms and conditions on sugar shipped on the canal so that they would be able to sell it on a firmer basis. Ripley of American wanted conditions stabilized and rates maintained and suggested the transportation companies get together, file their rates and conditions with the Institute or with an individual refiner, with the assurance that the individual refiner would send these rates to the Institute and it would inform all members. He said it would be well for the transportation companies and the others to do this thing and get together, or otherwise they would enjoy very few sugar shipments.

At a meeting subsequently held by the canal carriers, we decided to adopt suggestions made by the refiners and framed a number of rates which were substantially as [fol. 814] they are today. We agreed that we would try to get these rates from the refiners.

For shipments from New York to points beyond Buffalo the refiners paid a proportional rate of 14¢ to Buffalo. To be included in the 14¢ rate was an allowance of 25¢ a ton to the refiners for loading and an absorption of handling charges on deliveries to the lake steamers in Buffalo, which was approximately 44¢ a ton. The rate went into effect after a letter was filed with the Institute or an individual refinery. We were told to notify the Institute of any changes in the rates filed.

Petitioner's Exhibit 316 was received in evidence.

The condition of sugar after it was transferred over our line was excellent. We had damage once in a while but our claims during the whole season would not amount to $5,000.

In July, 1929, I called on the different refiners and told them I could not see how the refiner could stop a man from buying his sugar f. o. b. their plant and shipping it out on the canal and saving money. I called attention especially to our desire to solicit business from the manufacturer who used his own sugar, which business we were losing.

[fol. 815] Carling of Arbuckle said that he was not going to lose the few remaining customers he had in Rochester due to the fact that somebody could secure a cheaper barge rate than he. I told him our rate was 18¢ into Rochester, that we had maintained it for quite a few years and that there were competitors of ours who undoubtedly took sugar into Rochester for 15¢ or at a still lower rate. He said in view of the situation he was going to sell sugar f. o. b. New York and make a deduction from a man's invoice for the difference between the rail haul and the water haul.

Cross-examination.

By Mr. Browning:

In 1931 we handled practically no sugar tonnage. I know more sugar was shipped by the New York State Barge Canal in 1931 than in any previous year. I did not get the business because I did not go after it. I handled scrap iron instead of sugar.

At the Institute meeting attended by the canal carriers Taylor and Ripley said that they wanted rebating cut out. They did not say they wanted each canal operator to charge the same rate. They said they wanted each operator to decide what rates and service he was going to give and then file with the refiners with whom he wanted to do business a statement of those rates and conditions, and, having so [fol. 816] filed them, to adhere until he desired to change, whereupon he should give a like notice. There was no inference that the various operators had to have the same rates and conditions. I do not know whether some of the canal operators were rebating but I know they were cutting rates.

We were not subject to the jurisdiction of the Federal Trade Commission, the Interstate Commerce Commission or any regulatory board of the State.

It was not suggested at the meeting that we were not free at any time to change any rate or condition that we wanted to change if we announced the change with whom we were doing business, or with the Institute.

I tried to get sugar business in 1930 and 1931. I meant to infer that I did not haul because I had taken on a lot of commitments to handle scrap iron.

No reasons were given to me for our failure to get sugar business.

Re-direct examination.

By Mr. Rice:

In 1929 our sugar tonnage was 8,300 tons as compared with 30,000 tons the year before and that came principally from Edgar. Prior to 1928, 75% of our sugar was handled for customers as distinguished from refiners.

Edgar said our failure to get business in 1929 was on [fol. 817] account of the ruling of the refiners or the Institute of selling f. o. b. rail delivered basis, that he could not ship on the canal and could only clean up what contracts he had.

[fol. 818] Rochester H. Rogers was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

For some years prior to the spring of 1931 I was purchasing agent for J. Hungerford Smith Company, of Rochester, who manufactured fruits and syrups for the soda fountain trade and bought approximately 2 cars of sugar per week. Prior to January, 1928, we bought from the Defendants and received a concession or discount from their list price.

Petitioner's Exhibit 317 was received in evidence.

L. C. Watkins is a sugar broker in Rochester who acted for the various refiners, principally National.

Petitioner's Exhibit 318 was received in evidence.

During 1926, 1927 and 1928 we were getting barge shipments on sugar in Rochester and paying the barge rate. That stopped in 1929.

We frequently received an extension of shipping dates prior to 1928 but afterwards we did not receive it unless [fol. 819] it was for a few days. Prior to 1928 we were occasionally able to get our contracts repriced after a decline.

Petitioner's Exhibit 319 was received in evidence.

In the spring of 1929 the refiners announced delivered prices, based on the rail rate, for all deliveries. I tried to

get barge shipments at the barge rate in the navigation season of that year and applied to a great number of the defendant companies. I succeeded in getting such shipments but not openly. After the rule went into effect I was able to secure for my company a barge load of sugar delivered from some cartman from the door of Federal's refinery. I did not get barge shipments from any of the other refiners.

I discussed the rate situation with representatives of various refiners in the spring of 1929. I again protested to Bruyn and Smith of National in the spring of 1930 and asked them to change their rate on barge shipments. They said they could not do it. On another occasion when I talked to Smith in Rochester he referred to the Institute as making these rules and stated they would have to abide by them.

[fol. 820] Cross-examination.

By Mr. Browning:

When I spoke with Bruyn and Smith and the other gentlemen from National I do not think they clearly stated that National had adopted independently and as its only sales policy the system of delivered prices in Rochester. I assumed from what they said that they felt themselves obligated as members of the group to do as the others did.

The representatives of National expressed some sympathy with my position but stated that Post was very strongly in favor of following the rules and they could not persuade him to break away from the Institute. I was asking them to break away from the rules as far as Rochester was concerned and I remember very distinctly telling them we were the only people there who were interested because we were the only ones who bought enough sugar for use in our processes to justify buying a barge load. I asked them to allow our company to get the barge shipments irrespective of what was done with other buyers in Rochester. What I was trying to get from them was the privilege of buying sugar at the New York list price, bringing it there by barge, paying the barge instead of the rail rate. I presume I took up with Smith of National on one of these occasions the possibility of getting sugar secretly. I was aware when I asked him to give me a secret shipment

[fol. 821] that National's openly announced prices and terms stated that it would not sell f.o.b. I was aware, when Smith told me that the Institute rule kept him from doing what I asked, that what he meant was that he could not give the J. Hungerford Smith Company a concession which would violate his openly announced prices and terms.

Redirect examination.

By Mr. Fly:

I merely asked Smith for barge shipments at barge rates. I did not care whether it was secret or not.

Recross-examination.

By Mr. Browning:

I first asked National to change its price and terms for J. Hungerford Smith and Smith of National said he could not. On the occasion of this conversation I might have asked him to get out a secret shipment. I do not recall.

Redirect examination.

By Mr. Fly:

I talked to various representatives of the refiners about the Institute at different times. I criticized the Institute for making rules that were working a hardship in preventing us from bringing sugar to Rochester by barge and paying the barge rate. They said that because of the rules of the Institute they could not make these exceptions in our [fol. 822] favor.

Recross-examination.

By Mr. Browning:

The refiners' representatives said they could not make an exception in the favor of J. Hungerford Smith contrary to their openly announced prices and terms. As far as I know there has been no shipment by reason of the correspondence in Exhibits U-1, V-1, W-1 and X-1.

Defendants' Exhibits U-1 to X-1, inclusive, were received in evidence.

Petitioner's Exhibit 320 was received in evidence.

I wrote and sent the letter of February 4, 1930 to Smith of National (a letter mentioned in Exhibit 320).

Petitioner's Exhibits 321 to 329, inclusive, were received in evidence.

[fol. 823] MARTON H. FORCHHEIMER was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am vice-president of the Forchheimer Grocery Company, of Mobile, Alabama. The company is a wholesale distributor of groceries and has purchased cane sugar from the defendant refiners.

The rail rate for shipping sugar from New Orleans to Mobile from December 14, 1929, to June 1, 1930, was on a prepaid basis of 24.7¢. The barge rate up to January 1, 1930, was 19½¢. Shortly thereafter it was reduced to 17½¢. Sugar generally came into Mobile by barge and we paid the rail rate on the barge shipments. We made efforts through the refiners' brokers to get the barge rate on barge movements of sugar into Mobile changed.

We objected to the arbitrary application of the rail rate of 24.7¢ on shipments either direct from the refinery or out of consignment in Mobile because we had the services of the Mississippi Warrior Barge Line, over which we could obtain sugar from New Orleans to Mobile at 17½¢, but we got no relief. We objected to paying this arbitrary application on our purchases when we should have had the privilege of purchasing the sugar f.o.b. New Orleans and [fol. 824] bringing it over to Mobile at the cheapest rate available. They said that that was their price and that was the price their principals had determined and they were operating on their instructions. I also took up the matter personally with the representatives in the Senate and in Congress.

McClellan of Vass & Co., representing American, stated American was governed by the rulings of the Institute and that was their determination in the matter.

Prior to the time the rail rate was charged on barge shipments we ordinarily bought sugar in carload lots but after that time we bought in less than carload lots because we lost interest in the distribution of sugar. Our volume of business naturally decreased.

Early in March, 1932, Mobile was made a base point. It has no refinery but is a port of entry for C. & H.

From January 27, 1928, to March, 1932, we were not able to get sugar into Mobile at the base price. We paid the rates which I have mentioned upon those sugars shipped into Mobile directly and which did not come through any intervening port.

American's sugar came from New Orleans and C. & H.'s directly from the refinery in Crockett, California, but we paid the New Orleans rail application on all sugars to Mobile regardless of whether they came from refiners in [fol. 825] this country or in Cuba.

Cross-examination.

By Mr. Browning:

Mobile has been a port into which ships have entered and discharged goods as long as I can remember. Sugar was first shipped into Mobile by water 4 or 5 years ago when Hershey brought in off-shore sugars. C. & H. soon followed. Up to that time American had no competition in that market. When sugar came into Mobile by water it was never sold at a flat base price and from that time on the jobbers objected to paying a New Orleans rate on sugar which never touched New Orleans.

I had to pay the base rate plus the freight application whereas competitors in New Orleans, even if they got C. & H. sugar that came from Crockett, had to pay only the New Orleans base rate. It would have cost C. & H. less to ship goods from Crockett to Mobile than it did to New Orleans. The handling expense into New Orleans by water is more than into Mobile because Mobile is 30 miles from the Gulf and New Orleans is 100.

Prior to December, 1929, buyers in Mobile were able to determine the method of shipment from New Orleans and did not have to accept a fixed price from the refiner; the rate paid was determined by the actual method of transportation.

[fol. 826] There was no time even before 1928 that we did not have to pay the New Orleans base rate plus the actual freight from New Orleans on all shipments by the different refiners.

Until April, 1928, the refiners' freight application at Mobile was rail for rail service and deliveries from consignment and the barge rate on barge shipments.

In May, 1930, delivered prices were abolished and thereafter the cheapest rate applied. We could buy sugar and ship it anywhere we saw fit. The refiners probably absorbed the difference on the rail shipments but from that time on our purchases on a carload basis were very infrequent.

There was every incentive to buy from consigned stocks when the barge rate applied to deliveries from consignment but it was not a natural thing to make l.c.l. purchases because there were other methods of purchasing. We had the 4-payment plan, whereby we could buy in carload lots and spread payment over a period of 4 weeks. If we made carload purchases from consignment we received a drayage allowance.

Our interest in sugar did not revive when the freight application broke to the lower level, and it has never revived. Since 1930 our volume of business has been very [fol. 827] small. Prior to that change we had handled 4,000 to 5,000 bags a year.

In March of this year Mobile was put on a flat 10¢ rate, the lowest freight application it had ever had prior to that time.

Defendants' Exhibits Y-1 and Z-1 were received in evidence.

I am not clear whether or not McClellan mentioned the Institute but I discussed with him the question of freight applications.

Prior to 1929 I bought in carload lots from the refiners and had no difficulty in anticipating the assortment needed for my customers. We knew pretty well what they wanted and considered it our business to know their wants. It was not a serious problem to anticipate. At the present time the position of the Mobile jobber is more favorable than it has been in many years.

Redirect examination.

By Mr. Fly:

If I did not have a sufficient assortment of sugar I could obtain the necessary assortment from the warehouse consignments as they were available practically all the time.

[fol. 828] Defendants' Exhibit A-2 was received in evidence.

Petitioner's Exhibits 330 and 331 were received in evidence.

[fol. 829] HARRY H. BERNSTEIN was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am assistant manager of the Central Inspection & Weighing Bureau and have direct charge of the transit department which covers all transit privileges granted by all of the carriers in the Central Freight Association territory.

I have been connected with this organization for over 43 years and have had charge of this department since its inception in 1900. During the war I was made joint agent for all of the roads in the Chicago District. I compiled the freight charges for all grains and grain products that moved through that district.

As assistant manager of the Inspection Bureau I have been called on from time to time by the refiners who operate under transit privileges for my opinion on transit matters or my interpretation of the transit tariffs. I deal exclusively with railroad transportation matters and every transit operator calls on me for an interpretation of the tariff. It has been my daily work for 32 years to confer with industries who are operating under transit, explaining the railroad companies' position and how the tariff should be interpreted in line with the view of the Com-
[fol. 830] mission.

Transit is a privilege which carriers give to a consignee at a point intermediate between origin and destination so

that such consignee can reship at the same rate that would prevail if the merchandise had moved directly from the point of origin to the same destination.

A commodity which is shipped does not have to be absolutely identical with the one ultimately delivered.

The principle of transiting is to permit the sugar industry, the refiners, the forwarders, or any one who wants to ship sugar, to accumulate stocks at some point in order to reach the consuming market more readily and to supply their commercial requirements.

They can stop the commodity at intermediate points, which are called "transit points", and ship an equivalent of the transit sugar at the through rate, the same as if that sugar had been shipped direct.

In obtaining the privilege, shippers are restricted and subjected to rules and regulations which are published as applicable at that point and filed with the Commission. They must be complied with in order to obtain the advantage of the through rate.

[fol. 831] It is the duty of the Inspection Bureau, which is under my direct supervision and charge, to see they comply with the regulations. Under the ordinary tariff the shipper from the transit point must comply with the provisions relating to transit privileges. To obtain them, the principal requirement is that they must report the inbound carriers' freight bill to the Inspection Bureau and must keep a record in their own plant on all the sugar which they receive from any source whatever.

The owner, whether he is consignee or consignor, can ship from the transit point. It shows on the documents, which we can recognize as belonging to him, that it is his sugar and that he has the right to handle and reconsign it. The only person who can use the transit privilege is the consignee or someone to whom the consignee has endorsed it. Exhibit 439 is the tariff which has been in effect in the D. T. & I. Railroad and involves the transit rules.

Petitioner's Exhibit 439 was received in evidence.

The D. T. & I. is a party to the master tariff, called Boyd's Tariff 226, but we can find no record that the tariff of 1922 has been cancelled.

[fol. 832] The rules of the 1922 tariff were adopted by the Central Freight Association. I was a member of the com-

mittee that drafted these rules, which are quite uniform throughout the Central Freight Association territory.

The transit rules for various railroads in the Central Freight Association territory are similar. As a policing measure, they were intended to be fairly uniform with such modifications as were necessary to meet the different industrial conditions of a particular commodity.

There is no joint tariff at Detroit so that every road has its own transit rules but they are uniform except as to routing in order to meet and protect their long hauls under Section 15 of the Act Regulating Commerce.

Boyd's Tariff, a master tariff, covers the situation throughout the country and in addition to that there is an individual tariff in effect at Detroit. It is an application tariff on transit and is co-existent with Boyd's Tariff.

Exhibit 440 is the tariff of the Michigan Central which was in effect from February 13, 1922, to January 1, 1932.

Petitioner's Exhibit 440 was received in evidence.

[fol. 833] The purpose of Rule 7 of Exhibit 439 is to have the transit operator keep a record of all tonnage which is received either by rail, boat or truck and whether it is transit or non-transit tonnage.

The covering papers are surrendered as shipment is made. The transit operator has to cancel the billing as the tonnage is disposed of. If he avails himself of the outbound transit, he must surrender incoming freight bills of an equivalent kind.

"B" is for the purpose of surrendering inbound freight bills or local tonnage credits. If a railroad or a boat line does not have the transit privilege and the sugar is disposed of locally, the transit operator must cancel the billing which is representative of non-transit sugar so there is no excess credit on that tonnage after the property is disposed of. The carriers try to carry out the principle that a transit house must not have excess freight bills or excess credit for transit or non-transit on sugar which they have actually on hand. The billing and credit of the tonnage go hand in hand with the sugar the transit house has and are cancelled as it is disposed of.

The shipper knows that goods coming in, either by rail or boat, are entitled to transit privileges out where there is a tariff in effect to cover both, as there is in

[fol. 834] many instances. "A" refers to that situation. The word "transit" in parenthesis is used to designate the character of the inbound goods and the non-transit in "B" is used to represent the character of inbound goods also. Under "A" when they are giving outbound shipping directions they must give up inbound freight bills on which the transit privilege existed and, in addition to that, when they are disposing of sugar locally they must give up inbound non-transit freight bills so that they do not have excess non-transit credit on hand after the tonnage is disposed of.

When a transit operator forwards by rail or boat and the sugar arrives at Detroit via the Michigan Central and he forwards it by the Michigan Central to Jackson, he is required to keep a record of what he does and correspondingly enter up and cancel the billing for inbound reference on goods against that as it moves in and out in one way or the other. He must keep a record to offset so he cannot again use the billing against transit tonnage. Otherwise he could dispose of transit tonnage locally and keep his transit billing on hand and if he did not cancel it he would have it on hand to use against local tonnage which was received by boat or truck. He must cancel the non-transit [fol. 835] tonnage when he disposes of it non-transit, that is, locally, no matter how it came in, if he has the credit. If he forwards, then he surrenders the freight bill and gets the through rate. That is covered by "A".

The words "transit" and "non-transit" and "A" and "B" characterize the transit as it comes in, depending on whether there is a tariff in effect granting transit. "A" means that he must surrender for cancellation when he has shipped on the particular line that has the tariff.

If a transit operator has both transit and non-transit on hand, he must decide when he ships out or disposes of his sugar which one he is going to charge off. He can charge off either at his discretion.

He must surrender for cancellation enough inbound freight bills, which had the transit privilege, to account for the goods that he is now shipping out and, in addition to that, when he is delivering locally or forwarding by rail or boat over some other line, he must deliver up transit or non-transit goods if it goes by the same or another route as long as there is a transit privilege on the through rate.

If a transit operator receives a shipment of sugar by [fol. 836] barge from New York and he wants to ship over the Michigan Central to Jackson a carload of goods of the same character which he has also received from New York over the Michigan Central, he can take the carload of goods that he has received by barge and transit it to Jackson and deliver up the freight bills for the carload that he got over the Michigan Central. It makes no difference which sugar he ships. As long as he holds inbound freight bills giving him the transit privilege, he can ship that equivalent amount under the transit privilege, irrespective of the manner in which he got the particular load that he is shipping out.

As long as it was cane sugar as distinguished from beet sugar it was "representative". Beet sugar would not be representative.

There would be an impairment of the integrity of the through rate if a transit operator received 5 cars of cane sugar from New York to Detroit and disposed of that locally and didn't cancel that bill and then later on would get some in by boat and substitute that. That is one method of substitution which is improper and which we try to correct. If a shipper received 5 carloads by boat last week and 5 carloads by rail this week, he could ship out either as long [fol. 837] as he had sugar on hand, but if he received 5 carloads by train this week and sold it locally it would be wrong in not giving up those freight bills under "B" if at the time he had no boat load on hand. Therefore, not having given up those freight bills under "B" when he gets the barge load under which there is no transit privilege, he ought not to have on hand any freight bills to which the transit privilege applies.

My attention was called to transactions where it had been shown that Edgar & Son transited water-borne sugars out of Detroit. I was to investigate if there was any truth in the statement of substitution and I went there a week ago to check up some of the shipments that appeared to be in question. I did not see anything wrong with the exercise of the transit privilege in the original billing.

I also examined transactions wherein Edgar transited sugars out of Detroit which had come over the D. T. & I. I did not find anything wrong with the exercise of the transit privilege. They selected a billing and, having the

sugar on hand, were entitled to transit it on the through rate, inasmuch as the sugar does not have to maintain its identity as far as the railroad rate is concerned. It is the privilege for which the shippers asked. The carriers gave it to them so they could have a through rate on the same kind of tonnage.

[fol. 838] Petitioner's Exhibit 441 was received in evidence.

As early as 1930 I advised American that Edgar had this transit privilege or a transit privilege analogous to this.

I investigated 2 cars that came to my attention in July, 1930. One car came from Philadelphia via B. & O. Railroad and American, by its agent Advance Transfer Warehouse Company, reshipped a car of sugar to Lafayette, Indiana, surrendering the Philadelphia freight bill and the Inspection Bureau approved those shipping directions for the application of 50½¢, which is the through rate from Philadelphia, Pennsylvania, to Lafayette, Indiana. The contention was made that the car of sugar which moved to Lafayette had some New Orleans sugar in it.

It was my position that inasmuch as railroads do not require, under their tariff, that the warehouse maintain the identity of a carload shipment of sugar, a surrender of that freight bill was representative for the through rate to Lafayette, which would be offset when another car of New Orleans sugar was shipped with the Philadelphia sugar and the New Orleans billing used. So, after the 2 cars had moved they would have had the lawful through rate from New Orleans to destination and from Philadelphia to des-
[fol. 839] tination, the only difference being that the identical sugar was not preserved as to each shipment. That was not required and never has been since we have given the transit privilege.

There is a different through rate from New Orleans via Indianapolis to Fort Wayne and from Baltimore via Indianapolis to Fort Wayne and if there were 40,000 pounds in the New Orleans shipment and 80,000 in the carload from Baltimore, the transit operator could ship out on the New Orleans billing any amount provided it did not exceed the amount which actually came in from New Orleans. It might temporarily make a difference but it would not in the aggregate, and in practice adjusted itself.

This was a most unusual situation where the principal contended that he did not have certain transit privileges. It has never presented itself before to me, that the transit operator who wants the benefit of the privilege takes issue with us that we interpreted it wrong or against his interest.

I have 11 transit inspectors, travelling men, in that field, to check up on these industries and we do the best we can to protect the railroad companies' revenues. We want to interpret it so as to give the railroad all the revenue that they are entitled to, but at the same time we cannot take away the rights of the shipper to get the benefit of the transit on the through rate.

The Transit Bureau accepted approximately $500 from Edgar & Son as a correction of some 22 cars of sugar that had been transited because, after the transit billing had been applied, Edgar subsequently changed that reference [fol. 840] and requested that the carriers get the benefit of the local rate instead of the transit rate which they were entitled to in the first place under the tariff. As a representative of the railroad I accepted that correction.

Cross-examination.

By Mr. McCollester:

If there is an inbound shipment of sugar by water to Detroit and at the same time a carload comes in by rail, which is disposed of locally in Detroit but on which the billing is not cancelled, and then if the sugar that has come in by water is shipped out to Lansing and the inbound billing is presented for transit privilege, assuming that the sugar originated in New York and its ultimate destination is Lansing, the lawful rate to apply on that sugar is the through rate called for on the Michigan Central billing as long as the sugar is on hand.

If, at the time the sugar was forwarded from Detroit, the inbound billing was surrendered to the transit house, the only lawful rate to be collected for the outbound movement is the difference between the through rate to Lansing and the local rate to Detroit,—but with this limitation: if the transit billing goods had been sold locally before the barge shipment arrived and the warehouseman had wrongfully failed to surrender the transit bill when he surrendered the [fol. 841] goods locally and he still had it on hand and if he

then used it to ship out the barge, sugar which arrived afterwards, he would not be entitled to use the transit privilege billing and it would be the railroad's duty to collect the local rate.

None of Edgar's 22 shipments came within the limitation that there should not have been any inbound rail billing in his hands at the time the shipment moved out. Our records show that they were properly entitled to have the original billing credited to them and they were entitled to use that for the through rate at the time they shipped the sugar. Therefore, the Transit Bureau, in certifying that there were undercharges on those shipments and that the billing should be corrected and the local rate collected on the outbound movement or so much of the sugar as had arrived by water, was in error; but the railroads, in collecting the $500, were not violating the law because the shipper asked the railroads to charge the local rate.

I personally have not inspected the records of the Inspection Bureau at Detroit since the records of the 22 cars were corrected in 1930.

Rule 9-d, a copy of the New York Central tariff, shown in Exhibit 264, contemplates transiting both transit and non-transit sugar in the same car. The only way we can [fol. 842] determine whether the sugar is non-transit sugar is to obtain the documents from the transiting house. The transit operator is the only one who can decide what kind of sugar to put in. He is the only one in an authoritative position to say what is in that car and, if he surrenders to the Inspection Bureau a freight bill for 20,000 pounds out of a 40,000-pound car, he has a credit on the inbound shipment which is usually split up.

This interpretation would apply, not only to sugar which moved in by water, but to sugar which was purchased locally. I paid no attention to how the particular sugars shipped out reached the transit house.

It was the thought of the railroads that by liberalizing these transit rules and not restricting the identity of the sugar, the shippers could use each bill properly recorded for the benefit of their own road.

A beet sugar bill cannot be used on cane sugar and cane sugar cannot be used for beet sugar billing.

A bill would not be representative under the terms of the tariff if beet sugar were billed as a cane sugar ship-

ment and vice versa. "Representative" means that cane billing is only representative of the cane shipment. There is nothing in the tariff, however, that states that in so many words.

[fol. 843] If a shipper ships his car of refined sugar and does not say "beet" but just calls it "refined" sugar, I would not say he is violating any law if he is not defeating the rates, because they both take the same rate.

It is anomalous to say I would object to substituting beet for cane when I would not object to the manipulation of water-borne sugar for rail-borne shipments, but it is correct and appears necessary for the proper policing of the transit privilege. Of course we must be governed by our own judgment in the matter.

I cannot say this is the general practice of the carriers because I am really a policeman. The Interstate Commerce Commission looks on us to supervise and regulate the best we can.

I did not report to Ripley that I had detected improper transiting on 2 cars but we made the correction. The very fact that these shipments were properly described shows that there was no intent on the part of the shippers to misdescribe. It was a mistake of our rate clerk to accept cane sugar billing because the bill properly represented the description as beet sugar.

It was one of the functions of the Inspection Bureau to see that those who exercise or who desire to exercise the transit privilege keep the necessary records required by the Inspection Bureau. We have inspectors for that purpose. They do not get around periodically but do the best they can with the help we have. I understand that the district manager has kept in touch with the Detroit situation. He reported there was no violation of the tariff.

Our inspectors' report to me implied that Edgar and De-
[fol. 844] troit Harbor Terminals were complying with the tariff requirements. If they did not the sugar people would be the last ones to complain because they profited by the warehouseman's not keeping the record.

I understand the words "different kinds of sugar", as used in the last paragraph of Rule 3 of Exhibit 264, means the different kinds of beet, cane, corn or maple sugar.

I interpreted the word "equivalent" to mean that a shipper could take brown sugar from Brooklyn and granulated

sugar in barrels from Yonkers and perhaps powdered sugar in bags and ship it out to Detroit, put it in transit and as long as he kept the representative tonnage on that, he could take one of those bills, like the Yonkers bill, for brown sugar and that would be equivalent for any cane sugar that he shipped out against that one freight bill.

There is nothing in the language of the tariff to indicate that the words "different kinds of sugar forwarded as an equivalent against inbound sugar" means simply different kinds of cane sugar. We have to use our best judgment and ask the sugar people. It would have been possible of course to put in the word "beet" if I meant "beet".

The rule further provides "Records must be kept show-
[fol. 845] ing lot numbers and pounds". It would have been immaterial in certain respects whether or not Edgar kept records showing lot numbers of sugars received inbound and shipped outbound because that was put in so the warehouse would keep them by lot numbers like a public warehouse.

There are two kinds of through rates, joint through rates and combination rates. The joint through rates are those which are jointly published by all of the carriers participating in the transportation business.

The shipper may change his sugar or mix it as long as he desires and the railroad documents are prima facie evidence that the local rate was assessed. The only thing you can say to the contrary is that it was not the identical sugar. If the sugar were purchased locally in Detroit and was forwarded on to Lansing, I would consider that as maintaining the integrity of the through rate, whether inbound, local purchase or D. T. & I., because as long as the freight bill is credited properly to the transit house, it is allowed to use it. The railroads do not require the transit house to maintain the sugar's identity as long as there is unused inbound billing over a route over which a joint through rate applies to destination. If such billing remains in the hands of the transit house, it can exercise the privilege on any sugar it may have.

[fol. 846] Once in 3 months we go through the records but we must rely on the transit shipper's records and do the best we can to protect the railroad companies.

It is impossible for the railroads to ascertain which sugar in a transit house is entitled to the transit privilege.

The Eastern Trunk Line's interpretation of transit tariffs may differ from mine.

Under the Boyd Tariff that is now in effect, it is my opinion that water-borne sugar can be transmitted out on inland rail billing.

On the question of the records that must be kept, I agree that in interpreting the tariff one must consider all of the language in the tariff and that is my practice in interpreting. I would say that the records should reflect a correct statement of the date, where it came from and the kind of sugar, just as every business house conducts its business and shows a proper record.

[fol. 847] The following Petitioner's Exhibits were received in evidence:

Exhibit 336
" 337
" 338
" 339
" 340
" 341 and 342
" 343
" 344
" 345
" 346
" 347
Exhibit 348
" 349
" 350
" 351
" 352 to 354, inclusive
" 355
" 356 and 357
" 358
" 359 and 360
" 361

Defendants' Exhibit I-2 was received in evidence.

The following Petitioner's Exhibits were received in evidence:

Exhibit 362 and 363
" 364
" 365
" 366
" 368
" 367 and 369
Exhibit 370 to 373, inclusive
" 374 to 378, inclusive
" 379
" 380 to 384, inclusive

In Exhibit 15, volume 51 of Willett & Gray, covering the year 1927 and prior years, petitioner designated the portion of page 27 indicated by red pencil marks as the particular portion on which it relied.

In Exhibit 16 petitioner designated the portion of page

19 indicated by red pencil marks as the particular portion on which it relied.

[fol. 848] In Exhibit 17, volume 53 of Willett & Gray, covering the year 1929, petitioner designated the portion of page 27 indicated by red pencil marks as the particular portion on which it relied.

In Exhibit 19 petitioner designated the portion of page 25 indicated by red pencil marks as the particular portion on which it relied.

The following Petitioner's Exhibits were received in evidence:

Exhibit 385
" 386
" 387
" 388
" 389
" 390
" 391
" 392
" 393 and 394
" 395 to 397, inclusive
" 398 to 400, inclusive
" 401 and 402
" 403
Exhibit 404 and 405
" 406
" 407
" 408
" 409
" 410, 410a, and 411
" 412 and 413
" 414 to 417, inclusive
" 418
" 419
" 420
" 393d

Defendants' Exhibit Q-2 was received in evidence.

The following Petitioner's Exhibits were received in evidence:

Exhibit 421 to 423, inclusive
" 424
" 425
" 426 to 428, inclusive
" 429
Exhibit 430
" 431
" 432
" 433 and 434
" 435 and 436
" 437
" 438

[fol. 850] Defendants' Exhibit R-2 was received in evidence.

The following Petitioner's Exhibit were received in evidence:

Exhibit 442	Exhibit 452
" 443 and 444	" 453
" 445 and 446	" 454 and 455
" 447	" 456
" 448 and 449	" 393-E and 457
" 450	" 458
" 451	" 459

[fol. 851 & 852] WILBUR L. CUMMINGS was called as a witness on behalf of the Defendants.

Direct examination.

By Mr. Higgins:

I am a member of the New York Bar, having been admitted in 1905, and one of the senior members of the law firm of Sullivan & Cromwell.

I have had practical experience in the conduct of various branches of the sugar business since 1918. My first contact was the time I undertook the reorganization of the Delta Beet Sugar Corporation, which had built a large new beet factory in Delta, Utah, and had become involved in financial difficulties. We were asked to undertake to reorganize on behalf of the creditors and stockholders. I undertook the work for my firm, went to Delta, and spent some time there in the reorganization of the operating end of the business and came back and devoted a good deal of time to the reorganization of the financial part. I was made president of the company and operated its mill from 1919 until the middle of 1920. I was the general executive in complete charge of the operations of the business. While there, I made a survey of the beet sugar situation together with some experienced beet sugar men whom I employed to advise me for that purpose. I directed all the operations to complete the mill which was not yet finished and hired the manager to take off the crop of 1919. I directed the selling policy of the sugars from New York and had almost [fol. 853] the entire responsibility. My connection with that enterprise ceased in the summer of 1920.

In the fall of that year I became interested in the reorganization of Cuban raw sugar producing companies.

In 1921 I went to Cuba as counsel for National City Bank and lived there one year, operating 12 mills on the Island. In the winter of 1920 and the spring of 1921 there was a financial crash in Cuba. All the banks failed by reason of the rapid decline of sugar in the early part of 1921. National City Bank retained my firm to look after its sugar interests. For a number of years prior to that time my firm had been counsel for some of the raw sugar producing companies.

During the year I spent in Cuba, I had the chief responsibility of the management of the 12 raw sugar companies' mills. I was active in the management, spent my time going from one mill to another or in Havana directing the sales policies or attending to the financial matters.

I necessarily became quite familiar with actual market conditions, the cost of production of raw sugar, the price at which it should be sold and the conditions and terms under which it was marketed, because it was part of my duties through our sales organization at Havana to sell sugar. There were a number of other companies which my firm was reorganizing at the time.

My work in connection with the companies that I was [fol. 854] actively operating in Cuba has never ceased.

In the summer of 1924 I was retained to reorganize the Warner Sugar Corporation, which had 2 subsidiaries, one the Warner Sugar Refining Company owning a large refinery in Edgewater, New Jersey, and the other the Miranda Sugar Company owning a sugar mill at Miranda, Cuba. I was elected to the Board of Directors and am still on the Board today, although its only activities at present are the operation of a raw sugar mill. From 1924 to 1927 I was on the Board of Directors of the Executive Committee and the Operating Committee of the Warner Sugar Company.

The Operating Committee considered the raw sugar market, decided on the purchase of raw sugar, considered operating problems of the refinery, the purchasing of supplies, and directed the sales policy of refined sugar. The latter function of the committee was a very active and very important one. It was the most difficult end of the business. I had direct contact with the sales problems, the competitive conditions and selling policy and prices of the company.

My firm has been general counsel for the Institute since April, 1928. During that time I maintained active contact [fol. 854] with its day-to-day operations. In the last few weeks I represented all the refiners, beet producers and Louisiana cane producers in the hearing before the Tariff Commission.

I have been continuously familiar with the conditions surrounding the operations of the sugar business, both in the manufacturing and selling end in the United States. I have studied carefully and closely the statistics of the beet and domestic cane producers in the United States, the importation of foreign cane, Cuban cane and off-shore sugar. I have followed closely the course of market prices, both of raw and of refined, the conditions which govern and affect the prices and the manner in which the raw sugar business and the refined and beet sugar business is conducted.

During the wartime period the Sugar Equalization Board, appointed by Herbert Hoover, the Food Administrator, recommended the margin, which was fixed by decree of the Food Administrator. The margin was changed 3 times during the period of control, which commenced in September, 1917, and continued until December, 1919.

The first margin fixed for the refiners was 1.3¢ a pound. Later the sugar Equalization Board reported to the Food Administrator in writing that the margin was inadequate and recommended its raise. The Food Administrator [fol. 856] raised it to 1.45¢ and in the summer or fall of 1918 the Sugar Equalization Board again reported the margin was inadequate and the Food Administrator raised it to 1.54¢, where it stayed until the end of control. This was the margin allowed by the Food Administrator over the net cost of raws.

From 1917 to the fall of 1918 the price of raws was flexible and the refiner was limited to a margin of 1.3 and later 1.4. In other words, he had to sell, at wholesale, at a price which represented his net cost of raws plus that margin. In 1918 the Government purchased the entire Cuban crop and added to that purchase price 38¢ a hundred profit for itself, sold the sugar to the refiner at that time and allowed him 1.54 as his margin. The net result was that the retail price was 11¢ and the wholesale price 8.82.

It takes approximately 107 pounds of raw 96° centrifugal of Cuban sugar to make 100 pounds of fine granulated sugar, and this is an important element in determining the margin of profit between raw and refined. The actual margin of 1 pound of refined would have to be figured on 1.079 pounds of raw.

Other items that come out of the manufacturing cost are the purchase of materials and supplies, bags, cartons, brok- [fol. 857] erage and the overhead and general selling expense. There is left the net earnings from which the refiner has to charge off depreciation and other factors.

During the period of Government control the refiners were required to sell on open prices publicly announced. The practice of selling at open prices publicly announced purported to continue until today. It actually continued until 1923. The Food Administrator forbade the giving of price concessions, rebates, or any form of discrimination whatsoever during 1917, 1918 and 1919 and that condition continued for 2 or 3 years after the release of Government control.

The 2 years of Government control were the most prosperous periods of the refining industry as far back as I have ever seen statistics.

Before the time the Government controlled the price of raw sugar it fixed a margin of 1.3. It was not over a publicly announced cost price of raw because there was a free market in raw. There was an investigation made of the actual refining cost. The refiner received a license to refine and there was close inspection by the Government as to what he was charging for the sugar. There was a variation in the cost price of raws as between individual refiners. The price of raw was continually mounting, which made [fol. 858] the margin originally fixed by the Government too small because of the 7-pound refining loss.

In 1918 the industry made between 10% and 11% on its capital investment. In 1919 it made 15%.

The 1.54 rise went into effect as respects the Cuban crop. The old margin was retained with respect to purchases made during the summer of 1918. There was a distribution of the Cuban crop in December, 1918. The price to the refiner of the raw remained stationary during 1919 until the entire Cuban crop was sold. When the December, 1919,

crop from Cuba came in there was a free market again and the Government then released control, although the Act provided for control until the summer of 1920.

Defendant's Exhibit S-2 was received in evidence.

The fundamental factor in the selling situation in the industry and the refiners' financial risk was the wide fluctuations in the price of raws. 1920 and 1921 were periods of very rapid decline and refiners lost a great deal of money. 1922 was a very good year. 1923 and 1924 were bad years again because of the break in the market in the early part of 1923 and the sudden and wide fluctuations from then on until 1924.

[fol. 859] From the latter part of 1919 to the middle of 1920 the price of raw went up perpendicularly from a little more than 7° to 21¢ and then dropped almost perpendicularly to 5¢. In 1921 the price of raw opened at 5¼¢, went up to 6¢ and then declined to 3¼¢ before the year was over. The years 1922 to 1924 were periods of wide and abrupt fluctuations and were very difficult ones for the refiner because he had to guess the market.

If the price is abruptly and rapidly declining he is apt to suffer large losses. Where the price of raw is rapidly declining, such as was the case in 1920 and 1921, he might lose his entire margin in one day's drop of the raw price and that loss he has to take on all his unsold inventory because the price of refined follows the price of raw so rapidly that he loses on practically all that is unsold at the time.

Brokers and customers who know that the raw has declined will hold off buying until the refined declines. The declines in those 2 years frequently amounted to 10¢ a hundred at a time and in the course of a few days ½ to 6/10 of a cent a pound was not infrequent. Because of the way in which raws are bought, refined and manufactured, the [fol. 860] refiner in a given year cannot count on making up through the increased price of raw and refined what he loses in the drops. It is only a guess and a gamble.

I do not think that the refiners have or could have any control over the price of raw sugar. It is determined by world conditions. The raw sugar market is a world market. The refiners in the United States are small factors in determining the price of raw.

The total output of sugar for the world, both beet and cane, which I am about to give comes from Willett & Gray. The total world crop of cane and beet in the last 6 years has approximated 26,000,000 long tons per year. Approximately 17,000,000 is cane and 9,000,000 beet.

Of the 26,000,000, Cuba has averaged about 4,500,000 annually. Her output is about 1/6 of the total of the world's entire output and ¼ of the world's output of cane sugar. About 3,000,000 tons, or 60%, of Cuba's sugar is shipped to the United States. It is getting less each year because of increased production in the islands belonging to this country. Last year the amount was considerably less than 3,000,000 but 3,000,000 tons is the average for the period [fol. 861] the other figures are averaged on.

Cuban sugar is sold in the United States at world market quotations for sugar f.o.b. Cuba. The quotations in the United States are all cost and freight and are 12¢ more than the Cuban f.o.b. price.

There is a futures market on the Coffee and Sugar Exchange. Quotations there are of necessity practically in line with the market known as the actual market, which is the market in which the refiners buy, for if the Cuban raw sugar producers can get a higher price for their futures they will sell in the future and hold back their actuals, and if they can get a higher price for actuals than for futures they will sell their actuals.

An average of between 13,000,000 and 14,000,000 tons of sugar were dealt in on the New York Coffee and Sugar Exchange from 1925 to 1930. That represented about 5 times the amount of Cuban sugar sold in the United States. The aggregate sales fell to 5,000,000 tons in 1931 because of the Chadbourne Plan. Practically all of the sugar dealt in on the Exchange is Cuban sugar.

The refiners do not operate on the Exchange to purchase actual raw sugars. It is not practical. Some of the refiners operate in futures on the Exchange but I should [fol. 862] say the majority do not.

I do not know that the refiners either before or after the organization of the Institute have ever in any organized or concerted way attempted to exercise any control over the operations of the Exchange or over raw sugar market conditions. It would be so futile that I believe it has never happened.

The Institute has never concerned itself in any way with the market price of raw sugar or any other question relating to raw sugar.

When the Institute was formed, consideration was given to the gathering of statistics with regard to raw sugar stocks and purchases but that was abandoned because the refiners refused to give the information. At the time the Institute was being organized, most of the refiners who were present thought that could be done but after consideration all refused because it was thought each refiner would be put at a disadvantage in competing with another refiner who needed sugar on a particular day.

If the refiners should disclose the fact that they had been staying out of the market for a little while and several refiners seemed to be in that condition, they would merely be advertising to traders on the Exchange or the holders of actuals in Cuba that they needed sugar.

[fol. 863] The loss of the .07 of a pound varies with the price of the raw. The average cost for 1931 to the refiner of duty-paid sugar to make 100 pounds of refined was approximately 3½¢. The average selling price was 4½¢ so that the cost of the raw necessary to make 1 pound of refined is about 73% of the selling price of the refined. The highest percentage in the last 4 or 5 years was 85%. The average is between 75% and 80% over that period of time.

Out of the remaining 20% to 25% of the selling price of a pound of refined the refiner must get his manufacturing, selling and administrative costs, brokerage and net earnings. In terms of an average over a period of 6 or 7 years the cost of administration, selling and refining over and above the cost of the raw approximates .9¢, and the general average net earnings during that period amounts to approximately .1¢ or 10¢ per hundred pounds.

Defendants' Exhibit T-2 was received in evidence.

As shown by Exhibit T-2 there were 14 occasions during 1924 when the price of raw dropped in the space of a day or so, the amount of the drop varying from .2 to .6. In December 1924 the total decline amounted to 1½¢. The total [fol. 864] decline for the year 1924 exceeded the advances for that year by approximately 2¢ per pound.

From 1925 on, conditions have improved from the standpoint of the refiner in that the market has been more stable.

While the price of raw sugar has continued to decline, it has done so much more gradually and less violently. The refiner has been better able to judge the market. The swings up and down have been comparatively narrow but there is still that very powerful element of speculation in the refiners' purchases of raws.

From 1925 to 1927 this fluctuation in price was one of the major difficulties which confronted the business.

An even greater difficulty was the condition into which the business had gotten by reason of the rivalries and suspicions of the refiners, created by the system, which was resumed in 1925 and in volume in 1926, of giving secret concessions to the trade.

Between 1925 and 1927 there was no association which enabled the refiners to gauge conditions of supply and demand in the refined market. There was a refusal to exchange information. No association existed and there were no statistics or accurate information available as to refined stocks, consumption, location of the stocks about the coun- [fol. 865] try or with the trade, or production.

The only accurate statistical information that the refiner had was the record of the importation of duty-paid raw sugar, which the Custom House kept. It did not include duties upon sugars from the territorial possessions of the United States.

The individual refiners had no way of knowing how much of their raw sugar went into the warehouses and how much went to refiners and was melted. They had no information with respect to the amount of refined sugar piled up in refineries or shipped to different parts of the country for distribution from consignment points and no information as to current deliveries. Such information as they got was at the end of the year and it was not necessarily very accurate because even at the end of the year refiners did not give their melts.

Illustrative of what I said with regard to the lack of statistical information was the enormous accumulation of stocks in 1927. The refiners built up in the middle of that year enormous stocks of refined sugar and dumped them at ruinous prices at the end of the year when they found they could not be moved.

In 1927 per capita consumption of sugar fell off about [fol. 866] 10% compared with 1926, according to figures which have been obtained from Willett & Gray.

One of the most wasteful practices in the industry in the years 1925 to 1927 was the building up of these large stocks at consignment points. There were literally hundreds of them over the country where several refiners would have warehouse stocks which could be withdrawn on order of the local broker. By reason of the duplication by the refiners these stocks in different communities were sometimes five and ten times more than was needed for ordinary 30 to 60-day deliveries. They deteriorated, resulting in a great loss to the refiners in capital investment and inventories which they could not hope to move.

Between 1925 and 1927 the practice of giving concessions had grown until in 1927 60% to 70% of the sugar was being sold at secret concessions. By that I mean a particular concession which is given to one customer but is kept secret from the other customers in the trade and not given to the trade generally.

Many factors led to the giving of these concessions. Probably the principal one was the fact that refined granulated sugar, on which all prices are based and which makes up the great bulk of the trade, has become a standardized product. [fol. 867] The price of refined is tied so closely to the price of raw that it is controlled and dominated by the price of raw. Therefore, the average price of refined is something over which the refiners have no control. They are competing in a product whose price is determined by other circumstances than individual initiative or by their judgment of what they ought to get for their product. There is this continual abrupt fluctuation in the price of their product that causes a certain amount of uncertainty in trading with their customers.

Another factor is an almost inelastic demand for sugar. The price at which refined sugar sells has little to do with the amount an individual consumes. It enters so minutely into the budget that you cannot persuade people to buy much more sugar. If the refiners gave away their entire margin it would not increase the consumption of refined sugar. This is illustrated by the fact that the price of sugar has declined about 40% in the last 2 years and still consumption has not increased. It has decreased steadily since 1929.

In 1927 there was a slimness campaign which reduced

the consumption of sugar. In 1928 the refiners undertook an advertising campaign in the newspapers for the purpose of overcoming this campaign.

[fol. 868] Another factor that had an appreciable effect in developing the practice of secret concessions and rebates was the fact that the sale of refined sugar was in the hands of brokers and was not conducted or managed by the refiners themselves. No refiner has undertaken to any extent the sale of his own sugar since 1922.

Fine granulated sugar is absolutely standardized. In a hearing recently before the Tariff Commission we analyzed through Ridley's Laboratory, 19 brands of fine granulated sugar, including 4 off-shore brands, and it was so absolutely uniform under all tests that could be applied to it that the variation was infinitesimal. It is a chemical product of 100% sucrose and if it complies with the chemical formula, all of its impurities have been taken out, so you necessarily have a uniform resultant.

In advertising campaigns I have never known of any refiner in recent years claiming that his sugar was any better than any other refiner's.

The manufacturers, who consume about 1/3 of the product, know that there is no difference between the refiners' products. They use largely the bulk sugar in fine granulated form and would just as soon have one brand as another. As far as the brokers who sell and the wholesalers who buy fine granulated sugar are concerned there is no choice. There is a demand for packaged advertised sugar, [fol. 869] created by the advertising of the refiners, but the people who buy from the refiners will not pay any more because of these advertised claims or because of any other reason.

Approximately 90% of all sugar sold is fine granulated. That varies among different refiners because some of them do not make tablet and the so-called fancy brands of sugar. They all make soft sugar and most of them make brown sugar.

Price quotations in the business are customarily on the basis of fine granulated. Soft sugars and brown sugars sell at differentials below fine granulated. Price quotations move up and down in multiples of 5¢ at least; 15¢ and 5¢ are rather rare; 10¢ is the average price change.

In 1927 Federal, predecessor of Spreckels, and Arbuckle

were selling sugar 5¢ to 10¢ under the quoted price of the other refiners. Federal had a reputation of having sugar which was not quite as uniform in quality as others but during recent years this prejudice has entirely disappeared.

Klaus Spreckels would build up large stocks and then close the plant. Then when he thought the price of raws was right he would open it again, but in the meantime he was frequently out of sugar. He quoted prices in various markets considerably below the quoted price of the other re- [fol. 870] finers. For a considerable period he was what is known as a very limited seller. At times he was out of the market altogether but still had a quoted price.

Arbuckle was also known as a limited seller. They were commonly known to fill only portions of orders but I think the greater factor in effecting Arbuckle's price was the fact that the company catered to quick sales, known as spot sales and furthermore did not give concessions of any kind. Arbuckle's quoted prices were their actual prices and they sold only to customers who could pay quickly. They did not want any customers except those who could take advantage of the 2%, 7 days discount. I think they considered it a business policy to give 5¢ off the price of other refiners to get that kind of business. I do not believe Arbuckle ever consigned stocks during the period from 1924 to 1927. Most of the time during the years Arbuckle was quoting a lower price, their market was a rather limited one near New York. The other refiners met Arbuckle's price, at least with their own customers, or customers of Arbuckle whom they thought they could get away, by giving these concessions in the territory in which Arbuckle operated.

The refiners had a general selling basis as distinguished from their quoted price and then they had any old price below that which they had to use. There were as many sellers to the price structure as there were customers to [fol. 871] dig cellars and the Arbuckle structure was just one floor. The refiners would have a quoted price at which they sold when they could get it, but in a territory where they were meeting Arbuckle they would be selling at what would be called a base price.

Secret concessions and rebates which were below the general selling basis ran in multiples of 5¢. A usual concession was 10¢ but they went from 5¢ to 15¢ and even as high as 20¢ and 30¢.

Willett & Gray's chart of raw and refined prices for the years 1924 to 1927 shows that in any year the price of refined diverges somewhat from the price of raw during the canning months from June to early fall because the demand is greater. In Exhibit T-2 at the bottom of the page the line of so-called sugar margin in the winter, spring and fall appears to be approximately 1¢ and in June, July and August it runs up to nearly 1.5¢ and in 1927 for one period it runs up to 1.55¢ a pound. As the demand increases, the margin is apt to become wider and it remains that way until the demand falls off with cold weather.

The brokerage system operated in this matter of tieing the price of refined to the price of raw and introduced pressure on the industry for special rebates and concessions. The brokers are agents of the refiners in the sale of sugar, but the broker's livelihood depends upon the size of his [fol. 872] clientele. Many brokers publish market letters for their customers and discuss the trend of the raw market and the possible trend of the refined. If the brokers think the price of raw is going down and with it the price of refined they advised their customers to hold off buying. If the raw prices go down and the price of refined does not follow it, the brokers invariably advise their customers to hold off buying until the refined follows.

The drop in the price of refined sugar in the years 1925 to 1927 affected the efforts of brokers and their customers to get secret concessions or to avoid the effect of the drops. When a drop comes the whole effort of the trade and the brokers is to push the loss back on to the refiner. If a customer has not withdrawn sugar he has ordered at the market price and, before he withdraws it, the refined goes down, he of course seeks to get the contract readjusted to a lower price. As the customer is rarely in contact with the refiner he puts it up to the broker to achieve that concession for him. The broker's success materially affects his relations with the customer.

There was one set of concessions which operated when the contract was made and another that operated when [fol. 873] the contract was to be breached or adjusted. The adjustments went under the euphonious term of "repricing". After the contract is made the broker attends to the sending in of the specifications. He may attend to some of the details of receipt and delivery of the sugar

to the customer. If the sugar is at a consignment point the broker handles all the details of withdrawals and delivery. He is supposed to attend to or supervise the notification of the warehouse and the refiner of the withdrawals of the sugar, sending the original copy of the documents concerning the withdrawals and delivery orders. He also passes upon the credit of the customer as the refiner has no way, except a very general one, to determine the credit of a customer.

In 1918 American undertook to sell directly through a sales organization which they built up. They abandoned it in 1922 and went back to the brokerage system.

There are hundreds of consignment points around the country and the hundreds of warehouses and stocks from which daily withdrawals are being made make the expense prohibitive. One or two of the large refiners have some skeleton organization which makes an occasional check on warehouse stocks but most of the small ones have no such organization.

[fol. 874] In the later years before 1928 the 3 principal forms of competition were competition in price, competition in terms and territorial competition.

In the period just before the Institute, sugar had become what was known in the trade as a "loss leader". With the chain stores a loss leader is something they will sell at cost or less than cost in order to get people into the store to buy other articles. To a certain extent it is a loss leader today but not so much as it was in those days. It was also a loss leader with the wholesalers and the jobbers who handled sugar at little or no profit. I heard many of them say they wished they did not have to handle it at all.

The result was that the independent retail grocer was reluctant to handle sugar at all. He was constantly undersold by the chain stores who were using it as a loss leader. He not only refused to push sugar but was reluctant to get it in the quantities his customers wanted it. A canvass, made in 1927, showed that the retail trade was actually holding back on the sale of sugar.

The concessions that were given at the time the contract was made and the sugar was sold were of various forms. The customer would represent, whether truthfully or not, that he could get sugar from another broker at a price con-
[fol. 875] cession. The broker in turn would represent to

the refiner that in order to make the sale of the sugar to the customer a concession would have to be given.

The refiners had no particular contacts with the customers except the very large ones. They had no way of checking the representations made to them by the broker as to the concessions that had been offered the customer. There were no methods of checking these statements in any satisfactory way.

The statistics show that the customer more frequently got the concession than not. The refiner either had to give it or lose the customer. If the customer made the statement to the broker and the broker told the refiner that the customer had been offered that concession by someone else and this particular refiner refused to give it, the customer simply did not give his business to that refiner because he had to save his face whether or not he actually had a concession from another refiner. The refiner had no alternative but to give the concession or dicker for a lesser one than which was demanded.

The straight price concession had no relation whatever to the customer's volume of business. Concessions given to customers who bought very little sugar during the course of a year were just as large as those given to customers who [fol. 876] bought large quantities. The concessions had some relation to the so-called buying power of the customers and I think they were given much more frequently to the large than to the small customers but without relation to the quantity purchased. Undoubtedly the big customers were getting a great majority of the concessions. Probably it was a rare case where the little fellow got them but there were many instances where he did.

I think the amount of the concession represented generally the quality of misrepresentation. They did, of course, represent the bargaining power in the sense that they represented to a very large extent the buying power. There was no question but that it was the big fellows who were getting the concessions; the great bulk of the concessions were going to the big fellows against the little fellows.

The usual form was a straight out and out concession in price but the refiners considered the straight price concession more dangerous from the standpoint of the information becoming known. If it became known, the refiners had to reduce their price to the entire community. The

customer's only advantage in getting that concession was to get something that the others were not getting, and so he was less apt to make it known, but within the refiner's organization, which was a pretty complicated one, it might become known that a straight price concession was given because the organization knew what the open and announced price was for the day, what the selling price was and the territories where the selling basis differed from the open price so that when a contract came in and was accepted by the refiner at a concession in price it went all through the books.

[fol. 877] Numerous forms of concession were suggested which were not so open to detection. They were not given on the face of the invoice but by a rebate check, which would not go through the sales organization, at the end of the period.

One of the chief forms of concession was brokerage to the customer or split brokerage. Sometimes the customer was given outright brokerage amounting to 5¢ or 6¢, depending upon the brokerage rate in the territory, but that was dangerous because that brokerage transaction had to go through the books and it would appear that the same man who was the broker was the purchaser of the same sugar. More frequently the brokerage was given to a nominee, a relative or some concern in which the customer had an interest.

There was also what was called split brokerage in which the broker was allowed to split his brokerage with a customer with the consent of the refiner and many times without the consent of the refiner.

Brokerage is paid on the basis of pounds of sugar sold and not on the price. Even with a split brokerage there was enough to make a difference between a profit and a loss to the wholesale purchaser. The split brokerage more often came from the suggestion of the customer that he buy [fol. 878] his sugar through a certain broker. Then the arrangement would be with the broker to split the brokerage with the customer because the broker had not gone out and obtained that customer.

The storage concession was considered by the trade the most valuable of all, even including the ordinary concession. The sugar of the particular customer was ostensibly stored with him. It amounted to no more than consigning the sugar to the customer until he was ready to use it.

The sugar was not drawn on for any of the other requirements of the refiner or the refiner's customers and the refiner would pay storage on it at the ordinary rates and of course that was an out and out cash concession to the purchaser. It might amount to 5¢ or 6¢, according to the locality and storage rates of the locality or it might be by arbitrary agreement. The customer obtained in this way, a 30-day supply of sugar which is the normal supply he would have to have on hand if he were a wholesaler or a jobber or even a large chain store organization. He would have the interest for that time on the money which would normally be invested in that sugar, thereby saving 6%. The refiner carried the insurance which might amount to 2% more.
[fol. 879] The advantages of the storage privilege were estimated at around 10¢. But the most important advantage was the fact that the customer had the opportunity, if the price of sugar went down, to take out all of the sugar on consignment or at least report it as taken out as of the day the price declined. If he had a 30-day supply on hand and had been taking out the sugar at the higher price, and the refiner's price was declining, he could then report all of his withdrawals from stock on the day of the price decline. With respect to all the sugar previously withdrawn he received a price reduction. On the other hand, if the price went up he could take out all the sugar from consignment and report it as taken out the day before the price rose. He did not actually take it out but merely sent in a report that he had and then the refiner billed him for the amount. That would amount to whatever the price rise or price reduction was with respect to all the sugar that was reported on that move and would normally be 10¢ a hundred.

The storage concession was received only by large customers who had the space to store sugar. "Storage" is a misnomer. They had on hand only that quantity they would have had on hand had they bought the sugar. It was not stored there. It was merely put in the same place as [fol. 880] it would have been put if it had been owned by the wholesaler, jobber, chain store or manufacturer. It was in fact paying to the purchaser storage on his own sugar. They were given, like all other concessions, to the fellow with more buying power. A small fellow who could not handle a carload could not get it because the refineries only ship in carload lots. Storage concessions were given

customers who could take a carload at a time. The general distinction was the bigger the buyer the more apt he was to get them. They were not given to all large or small buyers but most of the very big buyers could get them. It was particularly true of some of the larger manufacturers who had ample facilities for taking care of a 30 or 60-day supply of sugar.

The refiners did not make any pretense of checking up on stocks which were stored with the customers.

Advertising allowances were another guise under which a concession was given. The customer was allowed 5¢ or 10¢ on an order as an advertising allowance. The order would go to the refiner's sales department as an order at the refiner's price quotations of the day and then this concession was charged to advertising and paid by the refiner by check.

The substitution of grades and packages was another form of concession. A contract was made for fine granulated sugar with the usual provision that the customer, within 30 days, should specify the grades and packages that he wanted, the ultimate price to be adjusted on the basis of grades actually drawn. He could specify a variety [fol. 881] of grades, some of which were higher in price than fine granulated but would be billed for fine granulated.

The delaying of billing or the sending of the bill later than the ordinary practice of the trade, was another form of concession. The practice of the trade was to sell on 30 days at a discount of 2%, 7 days from the day of arrival.

Split billing was another form of concession rarely used in the territory east of the Mississippi. The customer would take a carload of sugar and obtain the advantage of the special carload rates but he would be billed for only half the car at the end of 15 or 20 days and a bill for the other half would not be sent until the end of 30 or 40 days.

In the case of local deliveries, especially to chain stores, absorption of trucking charges was another type of granting a special concession. The refiners took the sugar from door to door and dropped it at the chain stores without charging extra or had secret agreements with the customers that they would pay for the deliveries of the sugar to the buyer's plant.

In localities where sugar moved in over a differential route the customer was charged on deliveries from consignment at the cheaper rate even though the sugar moved

[fol. 882] in at the higher rate and the refiner's freight application was based on the higher cost.

A frequent practice was to give a broker just before a move an allotment of 50,000 or 100,000 bags which he was permitted to place at his discretion among his customers at the price which prevailed before the advance.

As the largest customers were generally the more favored they would generally be given to the large customers and not to the others. The refiner in effect passed over to the broker, with respect to a certain quantity of sugar, the right to select customers in respect of whom concessions would be made.

Secondhand sugar generally means sugar which a customer has withdrawn and with which he has overstocked. The term is more loosely extended to sugars which he has not withdrawn but which he has contracted to take within the 30-day period. If the customer has not withdrawn the sugars he tries to get out of his contract in the event of a price decline. The refiner may cancel the contract or, instead of going through the form of cancelling, he may offer to resell these sugars for the customer without cost. Sugar which had been delivered to the customer would be resold by the broker and the second brokerage paid by the re- [fol. 883] finer. That form of concession was particularly frequent where sugar had not been withdrawn. It was not given to all customers alike or any considerable percentage of customers. Like most of these concessions it was given to the larger and more powerful buyer. It saved the buyer a brokerage fee which might amount to 5¢ or 6¢ a hundred pounds.

The customers, who had obtained from the refiner the right either to cancel contracts with respect to unwithdrawn sugars or to have the refiner sell the sugars which were on hand, were tempted to overbuy on the next move and were speculating at the refiner's risk. If the market went down the customer stood no loss and if it went up he of course withdrew the sugars or kept them and sold them at the higher price.

The giving of outright options was another form of concession. They were never given openly but by private agreement with some purchaser. If he gave an order for a certain number of tons he would be given an option on a larger quantity and after a price advance it was put through the books at the old price by predating the con-

tract. It was quite a frequent practice among the refiners in respect of many of these concessions to make a contract that bore a date before the move and which was received [fol. 884] some days afterwards.

Export sales were an occasional form of concession but not very prevalent. If the refiner at the moment had an export price lower than his selling price in the United States, he would sell on an export contract to a purchaser who had no intention to take it out of the country and would deliver the sugar on that contract.

Direct options to customers were much like the allotments to brokers. An option was given to take out a quantity of sugar in excess of that which the firm contract called for. It would be exercised in case of a sudden rise in the price of sugar within a certain number of days after the rise occurred. If considerable buying occurred and the raw market firmed up, the option became valuable and was exercised. The refiner had no practical means of protecting himself against the loss that would result upon the exercise of these options.

In 1927 the practice of giving the secret rebates and concessions was still on the increase. It was very extensive in the industry and was an overwhelming factor at least in those territories where the concessions were largely given.

Defendants' question with respect to the opinion of the trade as to the fairness or unfairness of secret concessions for the purpose of showing the good faith of the Defendants in organizing the Institute was objected to. The objection was sustained and an exception taken.

There were a good many conversations with the refiners [fol. 885] about these practices in 1925 and again in 1926. In 1927 the refiners began to confer with me as prospective counsel for the advice I could give them with respect to secret concessions and the possibility or probability of eradicating at least some by a trade association.

Defendants' question with respect to the opinions expressed by Defendants in 1925 and 1926 and at or about the time and in connection with the meetings which led to the organization of the Institute as to the fairness or unfairness or ethical or unethical character of the practice of rebates and concessions for the purpose of showing the state of mind of the Defendants in the organization of the Institute was objected to on the ground that the refiners

themselves should be called and on the further ground that the time designated was too remote. The objection was sustained on the ground that the question called for hearsay as to opinions of persons not on the stand and on the further ground that the time designated was too remote and that the only question involved was in connection with the refiners' purpose in forming the Institute, and an exception was taken.

The trade was making complaints about the effect of the discriminatory concessions. The small dealer complained that he was being put out of business and the bigger competitor was monopolizing the customers which he had had in the particular locality and making it impossible for him to conduct that part of his business which pertained to the sale of sugar. These complaints were coming in in increasing volume to my company, Warner Sugar Company, up to the time it went out of business in 1927. They came from all parts of the country and were discussed at great length at the meetings of the refiners and resulted in the organization of the Institute.

The meetings definitely commenced in June, 1927. Babst, chairman of the Board of American, Post, president of National, Manuel Rionda of McCahan, Rudolph Spreckels of Federal and Frank Lowry, who was at that time operating Pennsylvania under a lease from the owners, were present. I was asked to the meetings as a lawyer to advise them concerning this very situation, the [fol. 886] growing prevalence of this condition in the industry and the possibility of legally eradicating it.

These meetings were held from then on until September. We discussed at great length all of these different forms of secret concessions and rebates that I have mentioned here and which were prevalent in the industry and which the companies of all the gentlemen were giving. We discussed complaints made by the sugar trade generally as to these practices.

We discussed all concessions and the attitude toward them of that part of the trade which did not receive them, their effect on the trade, its relation to the refiners and to the industry as a whole and the effect upon the refiners and upon their organizations. The term which was used there was the "utter demoralization", the destruction of morale by these practices which part of the trade considered to be unfair because they were not recipients of

those same favors. The refiners expressed their concern that these practices which were given here and not given there were undermining the morale of their own organizations. Their great concern was with the possible illegality of what they had heretofore been doing in discriminating between their own customers. The substance of what they [fol. 887] said with regard to that particular matter was that the complaints of customers evidenced that some customers were getting monopolies of trade and territories at the expense of others who were being put out of business because of the superior advantages given to their competitors. The refiners were gravely concerned as to whether or not the giving of these concessions amounted to unlawful discrimination between those customers and asked my opinion. I told them that I thought it was a matter of grave concern even though the refiner who gave the concession might honestly believe he was meeting competition. If, in fact, it suppressed competition, it would result in or tend toward the creation of a monopoly and the burden of proof was probably upon the refiner to prove that he had given a concession to meet competition.

The refiners at that meeting stated that when they gave these concessions they believed they were meeting competition. Some of them said that they were going so far as to keep accurate records every time they made a concession or what they considered a discriminatory practice, against [fol. 888] some other customer. Nevertheless they felt there was a hazard in doing it because in order to come under the provisions of the Act, the burden of proof was upon them to prove that they had met competition.

Some of the refiners who were at those or later meetings, when other refiners were present, told me their counsel had advised them to keep records as nearly accurate as possible each time they gave a concession which might amount to a discrimination against another customer so that if they were attacked in the future they would have the best evidence possible. The evidence they said was necessarily meagre. In most cases they had to rely upon the responsibility of the broker because they had practically no contacts with the customers. The representations came to them through the brokers and even though it came directly from the customer they had no accurate way of checking. They would attempt to check up by finding out

whether that particular refiner by reputation or repute was cutting his price from his announced price or his selling basis in that particular territory and if they heard that he was and the customer so stated that the offer had been made to him and the broker confirmed it, either the [fol. 889] concession had to be given or the customer lost.

I told them that I felt it was lawful for them to cease to give concessions because of the hazards in giving them and because of the fact that if they were not protected by the provisions of the Clayton Act in giving them, and they did suppress competition, what they had done was illegal and that if they all cut out discriminations they would necessarily cut out the giving of the initial discrimination, which might have been unlawful.

They asked me whether or not they could form a trade association with a code of ethics or fair trade practices which declared for the sale of their product without any discrimination of any kind between customers and on open and announced prices on the same terms to everybody, large and small. I told them that needed a great deal of consideration and I advised them that before they formed such an association or declared for such a principle the matter should be submitted to the Attorney General or the Federal Trade Commission. It was later decided to submit it to the Attorney General.

At the next meeting various refiners presented a list of the different forms of concessions which they were giving [fol. 890] or which they knew others were giving. I wanted to submit to the Attorney General in concrete form the discriminatory practices they wanted to abolish. At our last meeting in September we had tentatively agreed upon 15 or 20 statements of fair trade practices regarding the matters, which we were to formulate into a code of ethics or a code of fair trade practices, to take up with the Attorney General. At that time many of the refiners were not on speaking terms with each other and there was the utmost bitterness in the industry.

We discussed the reasons for such an association, such as the practical advantages of abolishing these consignment points which resulted in a great burden upon the industry because of the amount of capital tied up in connection with them.

The principal thing was the gathering and dissemination

of statistics. The refiners had no statistics with regard to refined stocks and it was to be the purpose of the Institute, if one were founded, to install a bureau for the purpose of gathering, digesting and circulating statistics among the refiners and the trade. It was considered that statistics would be gathered with respect to the purchases of raw sugar, stocks of raw sugar, the melt of the different refiners, current stocks of refined sugar on hand and at con-
[fol. 891] signment points, volume of sales and other statistical information which was to be handled by a bureau within the Institute.

It was also considered that the Institute should have a credit bureau.

I went to Washington after our second conference to take up with the Department of Commerce and the Attorney General or the Federal Trade Commission the organization of this association. The Department of Commerce, under Hoover, was actively encouraging the formation of these trade associations and had put out a volume of law and suggestions on the subject. I was told at the Department that they recognized the value of an association and of this particular industry especially. I conferred with them about half an hour and at their suggestion went directly to the office of the Attorney General. I saw Donovan and presented a draft in typewritten form of a proposed charter, certificate of incorporation for the association as a membership corporation under the laws of the State of New York and a proposed set of by-laws and, in rather sketchy form, 12 or 15 suggestions with regard to trade practices. At that time the Attorney General was cooperating with trade associations, passing upon their codes of fair practices and sitting in on the organizations.
[fol. 892] He assured me of their full cooperation. We had a conference which lasted some time, discussing in detail what it was we proposed to do and he said when the matter was in final shape we should submit it to them.

I obtained an informal approval of the general principles.

Upon my return to New York I reported the results of this conference, that there was no objection on the part of the Attorney General and it was agreed that I should write to the other refiners of the industry, asking them to join us in these meetings for the purpose of considering the

formation of a trade association. On September 2 I wrote a short form letter to Texas Sugar Refining Company, Texas City, William Henderson Refining Company and W. J. Eldridge, who was president of Imperial Sugar Refining Company of Sugarland, Texas, and then later in the same day I wrote a still longer letter to Charles Godchaux, president of Godchaux Sugars, Victor Cutter, president of Revere, George Earle, president of Pennsylvania, W. S. Pardonner, president of Savannah, W. H. Hannan, managing director at that time of Western, George Keiser, president of Colonial, George Rolph, president of C. & H., and H. A. Jamison, one of the partners of Arbuckle, in substance asking them whether they favorably considered the formation of a trade association. It was favorably con- [fol. 893] sidered by all but 2 of the refiners and we decided to have a meeting. My last letter to them was an invitation to come to New York to discuss the matter at a meeting on December 12, 1927. They all accepted the invitation. C. & H. was at that time considering, if not committed, to join a trade association of beet producers and they either stated in their letter or when they arrived at the meeting, that they would not join this association because they felt their interests lay in the West where the beet sugar producers were doing business.

Defendants' Exhibit U-2 was received in evidence.

Goetzinger, general manager of Arbuckle, agreed to attend as an unofficial observer and Judge Ballou, general counsel for C. & H., agreed to attend as an observer for his company.

The fact that the beet people were organizing some kind of an organization of their own was discussed at the early meetings in the summer of 1927 but I do not know that it was ever mentioned that we invite them to join.

All of the 15 defendant refiners in this case were represented at a series of meetings held in New York and last- [fol. 894] ing from the 12th to the 16th of December. They met every day at the hours stated in the minutes. The discussions were very full. The mornings were given up to committee meetings and the afternoons to formal meetings of the refiners. I kept the minutes of all of the full meetings from December 12th to the 16th.

Defendants' Exhibit V-2 was received in evidence.

I sent a copy of each of the minutes to the refiners and one to the Department of Justice and to the latter I sent a copy of the certificate of incorporation and the by-laws.

Defendants' Exhibit W-2 was received in evidence.

The proceedings at these December meetings had the same general character as the more informal earlier meetings.

We discussed at the December meetings the legal aspects of the trade practices that we had discussed with them in the summer and possible liabilities under the Clayton Act. Exhibit V-2 represents every action that was taken. They are the various final acts of the meetings from day to day and are accurate minutes of what occurred. They do not, however, in any way represent the wide field of discussion. [fol. 895] There was never a word at any of these meetings, preliminary or final, with respect to price or with respect to limitation of production or division of territory or any thing which I felt was inhibited by the law, with the possible exception of a report brought in by the statistical committee.

It collected from all the refiners a statement of capacity of melt for several years, a statement of allowance that had been given to them under the Food Control Act and I think a statement of melt for the past several years. When that was brought up, I remember some member said the difficulty in the industry seemed to be that everyone was melting sugar and that the statistics would show that there was only so much business for everybody. I objected to that and said it was not a proper subject for discussion. One member said that the Secretary of Commerce had suggested that industries exercise the principles of self-regulation and I said that I thought that applied to the individual, that the only self-regulation that would be exercised was individual self-regulation, in the light of the statistics which it might be proper to gather. Nothing more was said about [fol. 896] it at that or any subsequent meeting and I never heard of it from that day to this.

There was a code provision adopted providing the Institute consider and adopt a uniform contract for the trade with the eastern, southern and Californian refiners, respectively, and a uniform contract for manufacturers who use

sugar in the manufacture of other commodities and that the Institute incorporate into its code of ethics or trade practices for the industry a provision to the effect that sugar be sold, delivered and paid for only in accordance with the terms of such contract.

There was another one to the effect that the Institute should study the question as to whether contracts should be entered into by refiners for amounts in excess of that which buyers could reasonably take within the time fixed for withdrawal, whether contracts should be entered into by refiners with no fixed time for withdrawals or for a length of time in excess of 30 days.

Two of the refiners, Godchaux and Revere, stated they had outstanding long-term contracts with Edgar. They said they would have to perform those contracts even though they had given concessions. It was then suggested that each refiner investigate and report at the next meeting on January 7 any long-term contracts outstanding which [fol. 897] might conflict with an effort to obtain uniformity of trade practices in the contracts for the various industries in the various sections of the country. At some later date some of the refiners reported that they had contracts other than the usual 30-day contracts.

I had an appointment with the Attorney General for January 4 and our meetings adjourned to January 7. It was suggested that if a trade association was to be organized on the principle of no discrimination between customers and sales upon open prices publicly announced, the refiners ought to refrain until January 7 before entering into any unusual contract which might conflict with those provisions which had been adopted under the code which I was to submit to the Attorney General.

Babst, chairman of the Board of American, who had acted as chairman of these meetings, Post, president of National and chairman of the Executive Committee or president of the Institute, and I went to Washington on the 4th and met Donovan and several of his assistants, Lamb, Williamson and another gentleman. They had a copy of the min- [fol. 898] utes of these meetings, a copy of the proposed charter and by-laws and apparently had made a study of it and they questioned us about the matter in detail. We discussed it with them all that day. We went into detail as to the conditions in the industry which gave rise to the pro-

visions in the proposed code and then went over them one by one, in each of which they suggested some change.

We took the suggestions down and that night went back to the Hotel and rewrote the entire thing, thinking we had met the suggestions. Post and Babst returned to New York that night. The following day I went back to the Attorney General's office with the revision for further discussion and was there all that day and finally came away with the code in the form in which you see it now, leaving one copy with the Attorney General's office. On the second day the same men were present and at the end of the day's session a letter was handed to me by Donovan.

Defendants' Exhibit X-2 was received in evidence.

I returned to New York and held the organization meet-
[fol. 899] ing of the Institute on January 7. The certificate of incorporation had been filed before the meeting. It had not been changed in any substantial particular from the form in which it was submitted to the Attorney General. The by-laws and the code were adopted at the meeting of January 7 without any change from the one I brought back from Washington. I sent printed copies of these papers to the Attorney General with a letter dated January 14.

Defendants' Exhibit Y-2 was received in evidence.

The printed code, Exhibit Y-2, is in the same form as it was sent to the Attorney General's office with the exception of 2 changes in subdivision 3(e) and subdivision 5. A letter was received from the Attorney General's office in reply to mine while I was in Europe and was acknowledged by Dulles of my firm.

Defendants' Exhibit Z-2 was received in evidence.

[fol. 900] I told the Attorney General it was our desire to cooperate with him in the conduct of the Institute, particularly as it had been organized in the way it had with his cooperation. I asked him to send a representative of his office as frequently as he desired to get any information he wanted regarding the conduct of the Institute or the business of the members. I asked him if he would send a representative to the first few meetings until it got under way. He declined to do that, saying they would avail them-

selves of the suggestion to make frequent visits to the Institute. I told him anything that the Institute had at any time in the way of correspondence, documents, files or anything was open to any representative of his office at any time.

Judge Ballou, a former justice of the Supreme Court of the Hawaiian Islands and a prominent lawyer of San Francisco, was chosen as the executive secretary shortly after my departure for Europe. In my first discussion with him after my return he said he was going to Washington to meet the Attorney General and to discuss with him what the Institute had been doing in the first few months of its operation. He did so and later told me of his conference.

Defendants' Exhibit A-3 was received in evidence.

[fol. 901] I became general counsel of the Institute in April 1928 when Judge Ballou came to my office and asked me to accept that appointment.

I had several conferences with Lamb in the latter part of May 1928. He stated that he had brought with him Whitney from the Attorney General's office and asked that he be allowed to make an examination of the files and records of the Institute and I told him he could have free access to anything the Institute had. Whitney was given access to all the files, records and correspondence and he was there off and on for months.

Lamb wanted to discuss particularly the effect of the code provisions respecting quantity discounts and consignment points. He said the Attorney General had received complaints from chain stores because they were deprived of the discounts they had been getting theretofore and he wanted to be advised as to the operation of that and go over it.

He also wanted to review the question of consignment points and said that they had been receiving complaints from small jobbers known as desk jobbers and from certain local chambers of commerce who complained of discrimination against their towns.

[fol. 902] These complaints that came in were from local organizations, Kiwanis Clubs and commercial clubs. He wanted to know exactly what had been done in abolishing consignment points. We went over both matters quite fully with him.

Whitney was at the Institute's office at intervals for a considerable period on and off for about 7 months. He commenced about the 26th of May and was there through December. He did not stay at the Institute all the time but went out and interviewed the various refiners and would return to the Institute and discuss conditions as he found them.

Some time in January I received a letter from Donovan in which he enclosed a report which had been submitted by Whitney and asked me to comment on it.

Defendants' Exhibits B-3 to D-3, inclusive were received in evidence.

I sent the letter and report to all members and requested they give it study and at a monthly meeting late in February they came prepared to discuss it. At that time they appointed a committee of 3 to consider the report and make the comments on it invited by the Attorney General.

[fol. 903] Defendants' Exhibits E-3 to G-3, inclusive, were received in evidence.

At the time Exhibit G-3 was submitted Mitchell was Attorney General and O'Brien was assistant in the place which was formerly occupied by Donovan. O'Brien personally acknowledged receipt of Exhibit G-3.

Defendants' Exhibit H-3 was received in evidence.

James L. Fly, the next representative of the Attorney General's office staff, undertook an examination of the Institute activities in December, 1929. Judge Ballou had died in the meantime and I told Taylor, the executive vice-secretary, to extend to him the same courtesies that were extended to Whitney in the preceding December. The next annual examination by the Attorney General's office was made in December, 1930, by Gorsuch. He worked there day after day and had access to all the Institute's files and records.

Defendants' Exhibits I-3 and J-3 were received in evidence.

[fol. 904] In January, 1928, when I took a copy of the proposed rulings, regulations or provisions of the Code to the Attorney General's office, the Institute was not or-

ganized. The only matters I discussed with the office at that time were the provisions of the Code itself as distinguished from the Interpretations.

The first provision reads:

"All discriminations between customers should be abolished and to that end sugar should be sold only upon open prices and terms publicly announced."

The first part of the Code from the first line down to the end of the page, was all written in these evening sessions between the 4th and 5th. This declaration of purposes was composed and put in here because the Attorney General's office thought we ought to declare broadly what our purposes were. We took up first the question of concessions which might amount to discrimination between customers.

We said frankly that one of the fundamental purposes of the organization of this association was to abolish these practices which we thought were unfair and unethical. We had no difficulty in agreeing upon this principle. We discussed fair trade practices adopted by the Federal Trade Commission, some that had been approved by the Attorney [fol. 905] General's office itself, notably the Fertilizer Code of the preceding year, and we were told that it was the policy of that office to encourage the elimination of practices that might be discriminatory. We said that the only way to abolish these discriminatory practices was to sell sugar on open prices publicly announced, that the keystone of this organization was to be the principle of selling to all customers, large and small, at the same price and on the same terms. We then discussed each of the various subdivisions, A to I inclusive, of Paragraph 3.

We took the position that these practices in this particular industry, because of its unique features, the uniformity of its product and the conditions under which the sale of sugar was made, always amounted to discrimination and were unfair, not only between customers but between refiners. We described in detail their effect, which harmed customers who did not get them and gave undue advantage to customers who did. We said that we felt it was injuring some and suppressing competition in some cases and that it was permitting the jobber or wholesaler

to freeze out of business those less strong and give to him, in his territory, a monopoly.

[fol. 906] The Attorney General's assistants discussed it some time. The operation of the industry was discussed and explained to them as much as I have undertaken to do it here on the stand. We took up separately each of these provisions. We took the position that these practices were necessarily discriminatory unless offered to all customers.

Provision 2 of the Code, quantity discounts, was the subject of more discussion than probably any other.

The gentlemen referred to the provisions of the Clayton Act which makes the giving of a discount for quantity purchases a lawful form of discrimination. We explained our reason for desiring to put such a provision in the Code and described in great detail the peculiar and unique situation of this Industry. Because of the peculiar nature of the sugar industry we felt that a quantity discount was only another form of unfair discrimination.

Because of the factors controlling the price of refined sugar and limiting the margin of possible profit to so small an amount in cents, a quantity purchase had little effect on the saving to the refiner. So many elements of his cost were beyond his control that the remaining elements were [fol. 907] scarcely affected by the quantity purchased at one time by one purchaser as purchases were conducted.

We explained that no quantity discount in this industry could normally reflect itself in a diminution of cost to the refiner by more than 1/100 or 2/100 of a cent a pound. The average profit in the industry is about 10¢ per 100 pounds.

At this time there was no such thing as a quantity discount in the correct sense of the word. The discount had no proportionate relationship to the quantity purchased nor did the discount have any definite or proportionate relationship to the saving to the refiner.

What were called quantity discounts by some refiners were discounts given without any relation to those 2 factors and which were merely a recognition of the trading power or the buying power of the purchaser. By buying power, I do not mean the size of the purchase that he was making at the time but the power which he had to buy and which of course was attractive to the refiner because it meant that he could buy other large quantities in the future, but none

of these so-called quantity discounts were given with any promise, agreement or understanding that the discount given would insure future business. If the refiner gave a [fol. 908] so-called quantity discount to a large purchaser, he did it merely in the hope that the purchaser would give him some business in the future.

By the Court:

On sugar moves, purchasers like A. & P. gave large orders but distributed them among the refiners. They could not confine their business to any one refiner because of the territorial situation. They played one against the other so as to get the biggest discount they could and then, taking that discount back to the other man, offered to give a part of their business if the concession was met.

In the case of the chain store and most of these large purchasers, an order placed on a move might be the equivalent of 10 average separate orders. In the case of the chain store the expense of filling the order was about the same as if the refiner had filled a number of separate orders or a number of orders equal to the number of stores which the chain store had in the territory in which their order was to be filled. The refiner had to deliver to as many stores as the chain store had.

The large manufacturer, the baking companies, the soft drink companies and some of the candy manufacturers with plants about the country only took their requirements out, under the 30-day provision of the contract, as they needed the sugar. For instance, if they ordered 50,000 [fol. 909] bags on a move they might take a few hundred bags out the first day and 1,000 bags the next day. They might take those out of consigned stocks in Detroit or Chicago. They might order them shipped directly from the refinery. I have known of cases where some of the large chain stores ask for delivery of as small a quantity as a single bag of sugar. Wherever they could get the concession they insisted upon the delivery to their store doors to save them the expense of trucking, storing and handling the sugar. Consequently in the course of 30 days the orders of the chain stores or the baking companies or the big soft drink manufacturers came out in the form of so many little deliveries that there was no economy to the re-

finer in that order, over his economies in respect to an equal number of small orders.

The bookkeeping was just as complicated and expensive to the refiner as though he had filled an order for so many small customers. If the stocks are taken out of the consignment points by these big concerns, and they always were and are today, the customer takes just as much advantage of the refiner as he can and calls for a delivery of 50 or 100 bags of sugar. There is the same amount of bookkeeping, delivery receipts, withdrawal orders and withdrawals from warehouses or deliveries from consign- [fol. 910] ment as in the same number of smaller orders.

Our position was this, to summarize it: This industry was not in the same position as those industries where quantity discounts can be given for promotional services. In many industries a manufacturer can give a quantity discount because of the savings, benefits or profits which accrue from increase consumption of his particular product by the same class of customers or the development of a new class. However, in this industry there is an inelastic demand. Even if a substantial discount is given to a chain store or a sugar merchant he cannot increase the consumption of sugar in any appreciable amount by passing on that discount. Even if he could increase consumption the increase would redound to the benefit of the industry as a whole and not to the benefit of the particular refiner.

Everybody uses as much sugar as he feels is good for him except those people who, a few years ago, thought it fashionable to get thin, but with the limited exception there is no class of non-users of sugar to whom you can appeal by pushing sugar.

The Department of Justice said they were holding to the policy, and expected to hold to it, of separating promotional [fol. 911] value from discounts in quantity purchases. In other words, they were holding to the policy that a quantity discount ought to have some definite relation to the quantity purchased by reason of the direct saving to the manufacturer, and that it ought to be available to everybody, not merely to the man who agreed to do some promotional service with the quantity that he purchased. They said that if buyers undertook promotional services they ought to be compensated for it in some other way and by some separate agreement. They referred to the injunction which they had

obtained against the United Cigar Stores, enjoining them from giving or receiving discounts in respect of quantity purchases for promotional services. That company was required to separate its contracts with Gillette Safety Razor, the other defendant in that case, in which they could receive the discount in respect to quantity, but if they were going to perform promotional services which were to be compensated for, that had to be done by separate agreement.

By Mr. Higgins:

The Attorney General's staff took the position that a quantity discount was an unjust, unfair discriminatory practice and said they would accept our Code with a pro- [fol. 912] vision not to give quantity discounts. That is why the provision went in that way. It was entirely redrafted down there and the reasons for the elimination of quantity discounts were put in. It did not occur in the original form and this statement that no economies were to be derived by the industry by reason of quantity purchases was inserted.

By Mr. Fly:

Donovan took the responsibility of saying the Department would accept this thing. That was at the last conference on the afternoon of the 5th, during which Lamb, Whitney, he and I worked out the revised Code. He sat there and dictated the letter in my presence in which he said the Code was acceptable to them.

By Mr. Higgins:

Subdivision 5 relating to consignment points reads:

"In the interest of a more even distribution to the trade, the Institute recommends that sugar shall be consigned only to recognized detention points for reshipment, or to recognized markets and then in care of railroad or steamship lines or to public warehouses and that the control of the sugar shall remain with the refiner."

There were not consignment points in all territories. The normal consignment point is either a junction point from

[fol. 913] which sugar can be trans-shipped by rail or a distributing centre, a large city such as Chicago or Detroit, from which sugar can be conveniently shipped to a large surrounding territory. The multiplication of consignment points at smaller places came about because one refiner, to get an advantage, would consign stocks at a smaller point, representing to jobbers that it was more convenient for them to have sugar at that point for quicker and more ready delivery to their customers. The other refiner, to overcome that advantage, would immediately follow by consigning stocks at that same place and there would be in that place sugar of every refiner who was selling in that territory or to customers in that town.

The condition that existed at one of these points before it was made a consignment point was as follows: The jobbers and wholesalers there would order their sugar in carload lots, store it and carry insurance on it. If it was made a consignment point the refiners carried that stock for them and the insurance on it. The jobber ceased to have any capital invested in his own stock because he could take out of consignment at that point any quantity he desired.

After the point was made a consignment point there grew up in the trade what was known as the desk jobber [fol. 914] who had no capital investment but only a desk and went around soliciting business in competition with established jobbers and wholesalers and took their business away from them. The term "desk jobber" became current in the trade.

When the point was made a consignment point, each refiner put in a stock of sugar. He had to put in a variety of assortments and if he was a manufacturer of various grades and forms of sugar, he had to put in everything that he manufactured. He had to have there a stock which could be drawn upon at any time by any jobber, wholesaler or desk jobber on order and of course he could not anticipate whether the order would be for fine granulated or for mixed grades.

Since several refiners were competing at most of these points, each refiner consigned stocks for the need of the community for 30 to 60 days and there accumulated 5 to 10 times the amount which the community could use.

When all competitors in that territory established stocks,

they were then on the same competitive basis that they had been on before they had established consigned stocks at that point.

[fol. 915] The withdrawal of stocks from consignment points had the effect of increasing competition. Smaller refiners who could not invest capital necessary to maintain large consigned stocks at these points were able to compete because they could sell through brokers without investing capital in large stocks. When a consigned stock was withdrawn by all who consigned at that point the competition went back to the old form of competition between brokers and of course brokers for any refinery in the territory had equal opportunity to compete in that place. I know of no place after the withdrawal of a consignment stock where the brokers could not get sugar almost over night. These consignment points which were deemed unnecessary were those which were near enough to junction or established points to be quickly served by sugar out of storage at those places.

The conditions which I have described were discussed with representatives of the Attorney General's office in connection with the formulation of this section of the Code.

The final provision of the Court reads:

"The Institute recommends the use by members of uniform contracts to be adopted by the Institute for eastern, southern and western markets."

There was a discussion among the refiners which was [fol. 916] substantially the same as that at the Attorney General's office.

It was to the effect that the usual contract with the trade was the 30-day contract. If the Institute, when formed, were to adopt the principle of selling only upon open prices publicly announced, it was believed that some uniformity of the customary provisions of the contract under which the sale would be made would have to be determined. I do not mean uniformity of price or uniformity of those terms which each refiner might want to vary in the territory or to the class of customers, but if it were left open to any refiner to announce special terms applicable only to one customer, it was considered that that would be an evasion of the principle. In other words, if a refiner announced on a certain day that he would sell sugar under certain terms and under

certain conditions and in a certain territory, giving certain advantages that fitted perhaps only one customer in that territory and were immediately availed of by that customer and then within a short time withdrawn by the refiner, it was considered that it would be only an evasion.

We therefore felt that some uniformity of what were known as standard terms of at least a 30-day contract should be arrived at.

[fol. 917] It developed that there was some difference in the contracts used in the eastern, southern and western markets, so while this provision was originally conceived in the form of a recommendation of adoption of uniform contracts, provisions were added which recognized territorial differences which were supposed to exist at that time. I think it developed later when we had the contracts before us that there were no such discrepancies as was originally believed. The Department of Justice said that that was in keeping with what they conceived to be the policy of the Department of Commerce in advocating the simplification of terms without affecting prices and that they would understand it to be acceptable and not in restraint of trade.

Cross-examination.

By Mr. Fly:

The refiners knew that many of these representations which the brokers and customers made, that they could secure better prices than their competitors, were not facts and they knew they had to give these concessions or lose the customers. They had to give them because they did not know in a particular case whether the customer was telling the truth. They knew or believed that a lot of this competition which they were meeting was so-called "phan-[fol. 918] tom competition". It was a common name in the industry. They were perfectly willing to compete openly and fairly and meet the lowest price that any of them could name but they frankly did want to cut out this phantom competition which compelled them to give rebates and concessions unnecessarily. I think that one of their motives was to increase profits by not having to give concessions to meet phantom competition. They were thoroughly disgusted with themselves and conditions existing in the in-

dustry. They were disgusted both from a moral and ethical standpoint and from a business standpoint.

The moral and ethical ideas which were put into the Code relate either directly or indirectly to prices to individuals and to the net returns received by the refiners. I do not know of any forms of discrimination that did not affect prices or the net return in an individual case.

Code ruling, Section 4, page 1, about the allowance of barge rates, reads as follows:

"If the quantity thus shipped is in fact inconsiderable it should be ignored rather than break down the freight application actually paid on the preponderating quantity of sugar."

I think that the breaking down of a price in a community, bounded by arbitrary lines, by reason of the small amount [fol. 919] of sugar going in at a lesser rate, necessarily works an unfairness on surrounding territory unless you extend the lower price to the limits of the territory served by the refiner. There is no fixed territory which can be determined as reasonably or naturally affected by the sending into a place of sugar at a barge rate.

The Code ruling regarding tolling contracts provides:

"A contract or agreement entered into by a member of the Institute by which a manufacturer, jobber or other buyer or user of sugar, enabled to obtain refined sugar at a price other than the openly announced price as announced from time to time by refiners, is discriminatory and is condemned by paragraphs one and three (a) of the code of ethics."

Assuming that a particular refiner is ready, able and willing to enter openly and honestly into a tolling arrangement with any customer or class of customers who can meet the conditions which he lays down, there is no moral principle forbidding him to do it because one of the conditions that he has laid down provided that the sugar be sold in accordance with the Code of Ethics. Such an arrangement was not precluded by this rule. If the refiner, through his contract, obtains sufficient control of this sugar to say that it is sold in accordance with the Code of Ethics, that is perfectly permissible under that rule.

[fol. 920] At the time of the formation of the Institute

buyers were not complaining about prices but were complaining that some other fellow was getting a better price which they could not get. I do not think it is a normal situation in a normal competitive market where the product is standardized.

After the formation of the Institute when any purchaser went to any refiner in order to get the price shaded in any way, he had to shoulder the burden of getting it shaded for everybody who was in the same circumstances and same conditions. In other words, no matter how honest a man was and how skillfully he bargained, he could not get a better price than others in the same general circumstances.

Petitioner's Exhibit 460 was received in evidence.

I recall speaking to Babcock, attorney-examiner for the Federal Trade Commission. He asked me for permission to inspect the files of the Institute but I refused, saying that an examination was made periodically by the Attorney General's office and we did not feel that we should grant that permission to the Federal Trade Commission. They were looking for evidence of unfair trade practices. There were plenty of complaints in the files of the Institute by one refiner against another and the Attorney General's office had access to them. I finally told him he could have all the information he wanted on any questionnaire in answer to any question I held was a proper question to be asked by the Federal Trade Commission in any such in- [fol. 921] formal examination. He gave me the questionnaire and it was answered.

There is a difference of opinion in the industry as to hedging and the value of it. Several of the refiners do it and several of them are very much opposed to it. There is expense involved and the payment of brokerage fees and they have to put up margins. I have heard some refiners say that hedging was a gambling operation even on the Exchange; that the protection was not definite or certain even there.

I told the Department of Justice we were going to institute a plan whereby the refiners would notify the world as to the price change which was to be effective in the future. I did not tell the Department that the Institute would function to circulate this information because it was not contemplated at that time. The Department was not

critical of the future price reporting plan when Judge Ballou presented it to them at Washington on May 28.

On February 7, 1928, the Institute requested the refiners to notify it immediately of any one's promulgating a new price. The whole question of price change was discussed with Lamb when he was in New York in May 1928.

Quantity discounts, consignment points and the so-called 3:00 o'clock notice were the only 3 matters he took up [fol. 922] with us.

I called at the Attorney General's office about half a dozen times during the life of the Institute to discuss its operation. I was never invited to go but I went down to ask them how they felt about it. They had made investigations and I wanted to know what their attitude was. I was never told by anybody that the Department had serious doubts as to the legality of the operation of the Institute as a whole.

I did not tell the Department of Justice that the Institute was going to fix prices, freight rates, put into effect a delivered price system or enter into agreements with large sugar merchants to maintain the prices maintained by the defendant refiners for the sale of their sugar. I did not tell the Department that the Defendants contemplated refusing to sell sugar f. o. b. refinery or that the Institute was to take steps to prevent customers from utilizing the available water transportation facilities or choosing the means of shipment of their own sugar. I did not tell the Department that the refiners proposed to charge artificial freight rates in excess of the amount expended therefor nor that the Institute was going to take steps to deprive the distributors of much of the value of transiting privileges, nor that the refiners proposed to meet and together [fol. 923] with railroad representatives frame rate tariffs on sugar; nor that they were going to concertedly or by agreement deprive the distributors of their customary and legal rights to transit sugar in accordance with the railroad tariffs; nor that the Defendants contemplated establishing and maintaining an artificial freight rate system which would produce discriminations in price far out of proportion to the difference in actual freight rates. I told the Department that the Code would not be self-executing and would have to be interpreted from time to time and rulings would have to be made.

They said as those rulings and interpretations were made

they would like to have them sent to them. I told them it was not possible to conceive the Code would execute itself and that it would require a great deal of interpretation as it had to be applied to particular circumstances and cases as they arose. They said they understood that.

I did not tell them the Code of Ethics and Code Interpretations were binding on members because they were not binding unless the members wanted to be voluntarily bound. I did not tell the Department that the members were going to undertake a voluntary obligation to carry out the Code and rulings but the Department had a right to assume from what I said that if the refiners subscribed to the Code they would have some moral obligation in regard to it, at least until they gave their associates notice [fol. 924] that they intended to depart from it. I told them the Institute was going to undertake to observe the performance for its members and the trade, at least by the brokers, of the Code of Ethics and they would require some machinery for supervision.

I don't think I told the Department specifically that we would have an enforcement committee. I told them I thought the Institute had to see that its members lived up to its moral obligations, at least as long as they were members of the Institute; that if they didn't they would get out. I did not tell the Department that the Institute would have investigators pry into the private business of the refiners and distributors and procure for the combination the most intimate details of their contractual relations and other matters of private concern having to do with the distribution of sugar. I told them that we expected to enforce the provisions of the Code and have something in the nature of an inspection bureau to ascertain whether there were violations of the Code whereas members said they would live up to the provisions in it.

The Institute pried into what it had reason to believe were breaches of the Code by members or dishonest practices of brokers and warehouses. It found many intimate details of fraud and deceit. It found intimate details of most of the transactions it pried into. The record of the Institute is voluminous on that.

I did not tell the Department that the Institute was going to force any person to take an oath; nor that it was going

to hold trials or hearings before committees of the Defendants at which they would call various persons to give evidence including the Defendants. I did not tell the Department that we were going to force the brokers to take solemn oaths to comply with all the Institute Codes and rulings, resolutions and decisions; nor that the Institute [fol. 925] proposed to blacklist any customer, broker, warehouseman, or transportation company. I did not tell the Department that any refiner would find it necessary to apply to the Institute for authority or permission to meet competition. I do not recall any instances as such but I recall many instances where refiners asked the Institute to interpret some provision in the Code before acting on their own initiative.

By answering these questions in the negative, I do not want it inferred that I agree that your questions, from pages 4943 to 4956 of the Record, are statements of fact.

In my intimate day-to-day contacts with the Institute and its operations, Judge Ballou frequently came over to my office to discuss matters with me. Sometimes he sent me letters on important matters on which he wanted an opinion. I went over when I was invited to attend. After Judge Ballou's death the contact was more frequent. Crosby, my partner, and I attended quite regularly the meetings of the Board of Directors and the Executive Committee. We received a telephone call from the Institute every day or so. Neither officials of the Institute nor officials of the refiners ever called me in and asked me to intercede with any of the refiners who were proposing to make a change in prices, rates or terms. I never got in touch with them at such times for the purpose of interced- [fol. 926] ing in connection with a price change or in connection with a change in terms or rates. I never discussed prices with the Institute or any refiner during its history and I never heard prices discussed in or out of the Institute.

A man might be a warehouseman and be perfectly honest, but still if he was affiliated with the sugar industry, and we thought it was discriminatory to some sugar refiners, we believed he should cease storing sugar.

The elimination of consignment points eliminated desk jobbers. In all the communities where consignment stocks were carried, there had been jobbers who carried stocks and who complained that they were being put out of busi-

ness by the desk jobbers. After the elimination of a consignment point a desk jobber would have to have a warehouse. The abolishment of consignment points, where they were deemed unnecessary, was of economic benefit to the refiners. The wholesalers and jobbers who had warehouse facilities were likewise benefited.

I do not think there is any place to draw the line, if you adopt the principle of not storing with customers. If the customer, through a corporate affiliation or otherwise, derives a benefit from the storage that his competitors do not derive, I think that is a discriminatory advantage. What degree of affiliation would amount to an interest in the storage was discussed at length. It was finally decided that the only practical solution was to treat all alike and to [fol. 927] refuse to store with any jobber or wholesaler who was affiliated.

The moral or ethical principle behind the efforts of the Institute to prevent a general breaking down of the delivered price system was the prevention of discrimination, individual and geographic.

The delivered price system was not any system of the Institute, the Institute having had nothing to do with the establishing of delivered prices.

We were interested in the unfair character of competition as conducted in the United States May 4, 1928. Export sales had no relation to that picture whatsoever. They were conducted on the open world market at open prices.

If refiners were going to change their price they must publicly announce it. The Institute recommended that it be done before 3:00 o'clock in the afternoon so as to get wide publicity. It was reported to the Institute and by the Institute to each competitor prior to 3:00 o'clock on the day preceding a move but not until after it was made public either by posting it in the office or giving it directly to the newspapers. Some refiners gave it directly to the ticker and they all, as a regular practice, telegraphed or telephoned their brokers before they sent it to the Institute, which required that the refiners make it public in the regular way before sending it such notice. The refiners have not paid much attention to this 3:00 o'clock notice with regard to declines in the last 2 or 3 years. It is my information that a decline goes into effect immediately and is

[fol. 928] generally retroactive as at the beginning of the day.

Prior to the formation of the Institute, straight price concessions ranged from 5¢ to 25¢. The more common concession was 10¢ or 15¢. Of the sugar sold, 60% to 70% of it was sold at some concession under the published price in highly competitive territories where concessions were given. I think in the highly competitive territory concessions were given on 50% of the sugar that was sold. They were not given to any extent in New England and not at all in the 11 western states. Some of the refiners did not give concessions.

There are reasons why all purchasers did not go to Arbuckle. If they did they pretty nearly all had to have cash or very good credit and the only concession they got from Arbuckle was the 5¢ concession, which was not very attractive to some of them who were getting 10¢ and 15¢ from the other refiners.

In the highly competitive territories concessions were given on not less than 50% of all sugars sold. It may have been as much as 70%. I have in mind Chicago and Detroit and down through Illinois. Texas and the South are highly competitive territory. I should say that 60% of the refined cane sugar of the United States is sold in highly competi-[fol. 929] tive territory, which includes all of the United States except New England and the 11 states where the eastern refiners do not compete.

The New England buyers paid the list price or the American's selling base. In the Middle Atlantic states they paid any price they could get. That is highly competitive territory between New York and Philadelphia refiners. I should say that probably 50% of the sugar in the Middle Atlantic states was sold below the published price. The Southeast was not highly competitive at that time. It is pretty highly competitive now because New York refiners have gone in there and competed with Savannah, but at that time they were not in the market and Savannah had the territory pretty much to itself. I should say most of the people in the Southeast paid the full list price and by Southeast I mean south of a line drawn through North Carolina and including South Carolina, Florida and probably part of Georgia.

The Mississippi Valley was rather highly competitive

territory then and it is more so now, but in that territory C. & H. and Western sold only at openly announced prices.

Of all refined sugar sold in the entire United States [fol. 930] during the year 1927, I would estimate that 30% was sold at either a straight price concession or some other concession. There was not one person in the trade at that time who could with accuracy ascertain the amount of sugar which was being sold at any particular level.

I would define as a growing monopoly any operation of a broker or a jobber which permitted him by discriminatory concessions to get all the trade in his territory. It is not a fact that most of these wholesalers who had a thriving business and were extending the territory in which they were operating were located on waterways. I did not have that question in mind when I gave my answer to that question the other day. I was talking about deliberate discriminatory advantages which the refiners were giving in certain territories to certain customers that enabled them to take away the business of the other refiners.

[fol. 931] WILLIAM W. GARDINER recalled.

Cross-examination.

By Mr. Higgins:

From my practical experience and contact with the business, I know there is but one general selling basis for sugar in any given community. There is only one figure because it is impossible for someone to sell sugar at a higher price than someone else. It was all standard. If anyone had a fancy name and pretty package it did not make any difference. In actual practice in contact with the trade for many years, before the Institute as well as since, the known selling basis of one refiner was the same as that of another, assuming they carried the same general variety.

The prices which we published on the first page of our journal of November 10, 1927, I have indicated as "refined sugar quotations." On the second page we have designated as one price "market quotations granulated net cash" which on this page is 5.586. The figure on the second page is the general selling basis of the refiners in that

community. The prices printed on the first page are what we call the list prices of the refiners. They have been in existence for a great many years and there is a sort of custom in putting those on the board. They do not mean very much and if that was the only quotation we put in our journal it would not be worth much as a market quotation.

[fol. 932] We had to ascertain the lowest price that a buyer in good standing could buy a carload of sugar for, and we found that to be the general selling price. Our method of determining that was to go to the refiners, the brokers and others in the trade and ask at what price sugar was sold. We saw the contracts at the brokers' offices. The figure 5.586 on the second page was not the lowest price at which a buyer could purchase on the basis of some secret concession. It was the lowest open price of all refiners in that market on that day. We never had any argument or question as to our figures being right, or otherwise I would have been very careful to correct them.

In my experience in going about among the trade, interviewing the refiners and brokers about a prevailing price in a given market at a given time, I did not find that any refiner in the market was able to get more for his sugar than the lowest quoted price of the lowest refiner. The reason is that sugar is a standard article and no refiner is ever able to get any more provided these same things are equal. Sometimes the assortments, shipments and deliveries would be important.

Our journal goes to press on Thursday and the quoted prices on the first page and the selling prices on the second page were the prices prevailing at that time. Just before [fol. 933] going to press we usually had a small note at the end of the article in which we said that the demand was increasing or looked stronger and that some refiner had already made an advance or maybe that somebody reduced the price. We ordinarily stated what the changes were on those things. We would indicate in the journal that there was a price change in effect and that the quoted price would not necessarily represent what the refiner was selling for at that instant or even his quoted price at that instant.

In the days before the organization of the Institute, if one refiner reduced his actual general selling price in a given community the other refiners usually followed im-

mediately. If in a given community at a given time one refiner announced an advanced selling price for the future, that new and advanced selling price would not go into effect if all the refiners did not follow.

In the days before the Institute, when the list prices varied 20¢ or 30¢ on a given day, the refiners did not always change them when they changed their general selling basis. The word that there had been a change in the general selling basis in a given community would sometimes get around instantaneously. When one of these price changes started in one section of the country it spread all [fol. 934] over the country very quickly because of the increased demand at the old price.

In my experience, aside from the question of secret concessions, there has not been any greater uniformity in the actual selling prices of refiners on a given day in a given market since the formation of the Institute than there was before.

Redirect examination.

By Mr. Rice:

The market quotations that are contained in each issue of Willett & Gray on the second page represent the lowest selling basis in New York minus 2% cash discount.

In fixing the figure 5.596, which is equivalent to 5.70, I did not take the list prices on the first page, select the lowest and then simply deduct 2%. After having first gathered the list prices as published on the first page, I made an independent investigation as to the price at which they were actually purporting to sell.

These list prices never interested me a bit. I would not even look at them except to see they were the same as the refiners posted on the boards.

The price basis develops just as it would in any commodity market, depending upon the demand and the condition of the raw sugar market. It is not difficult to ascertain whether the particular price charged by a refiner represented a concession price or a price basis.

[fol. 935] Evan T. Fisher was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am office manager of the Institute and superintend the general routine of the office, spending considerable time on statistical work and answering numerous inquiries from members of the Institute. I have been with the Institute, which is a New York corporation organized under its Membership Laws, since February 15, 1928.

The administrative officers are Fred G. Taylor, executive vice-secretary, Patterson, his assistant, and myself. The office of the executive secretary has not been filled since Judge Ballou's death in 1929.

The offices are located at 129 Front Street, New York City. Taylor became connected with the Institute in May 1928 and Patterson in March 1928. The latter answers inquiries from members and supervises any special investigations.

In addition to the staff there are 7 men and 7 women and 2 messenger boys. Five of the men and 2 of the women are statisticians. We have a stenographer and one man who handles original statistics. Two men permanently in our employ are used for investigations.

The annual salaries of the 3 executive officers together approximate $40,000 a year. The salaries of the rest of [fol. 936] the staff are about $45,000 a year. Our general overhead expense, including rent and cost of operation, is about $85,000 a year. That includes rent, office supplies, heat and light, telephone and telegraph bills, postage, auditing and legal expense.

We have spent on the average about $450,000 a year for advertising sugar. We advertised ice cream, cereals and various other things with which sugar would be consumed. The ads have our signature at the bottom of them in small type. There are a few in medical magazines and in certain other magazines which housewives are supposed to buy. We have conducted advertising campaigns that were designed to combat slimness campaigns and fads. Our advertising campaigns are designed to increase the consumption of sugar.

We are spending $25,000 a year on a fellowship in the Mellon Institute, designed to try and find some non-food use for sugar that would stimulate consumption.

The Institute defrays its expenses by assessments upon its members in proportion to the amount of sugar they melt.

The price announcements which the Institute receives and circulates all go over my desk. I used to supervise sending them out but that has now become a routine matter [fol. 937] which is taken care of by the stenographers. After May 15, 1928, we have sent out to all members and to a number of other people the exact wording of every price change telegram which we received from our members and from some of the off-shore selling agencies. Every time a refiner announces a change in price we receive a copy of the announcement. He is supposed to send the telegram after he has announced the price change. This is according to the definite instructions and provisions of the Code, which are that he is to send it to us after he has announced it to his brokers and the world at large.

After we receive these price change announcements we wire them to all members and to a trade list, including certain brokers and news agencies. The brokers are L. W. Armstrong, Daub & Carr, B. W. Dyer & Company, Lamborn & Company, H. H. Pike, Hershey Corporation, Dow-Jones & Company, Wall Street News, Domestic Sugar Bureau and E. P. Anderson who is the Institute's representative in New Orleans. Exhibits K-3 and L-3 are typical of the way we handled our price change notices.

Defendants' Exhibits K-3 and L-3 were received in evidence.

The first sheet is an index sheet. Our announcements are all numbered.

[fol. 938] Whether or not a price change going into effect at the opening or closing makes any difference to the buyers, depends upon whether the price has advanced. If it has advanced it gives them 8 hours longer to get the business at the old price. In relaying these announcements we never add any suggestions or notations. We never have any separate telegrams on any of them and we never have any telephone calls except to find out whether someone has made an advance. We always have half a dozen telephone calls from other refiners and occasionally from brokers, before we get the first price change notice, asking us if we received it.

Outside of the function of relaying these announcements, the Institute does nothing in relation to price changes. It has not sought to change the method employed by members in announcing their price changes.

The Code Interpretations regarding price changes are: Section 1, page A, paragraph 2, called "Posting"; Section 1, page A-1, paragraph 3-A, called "Price Changes"; Section 2, page A-2, paragraphs 4 and 5, called "Notification by the Institute" and "Three o'clock Notice". These are the only provisions relating to price changes.

The 3:00 o'clock provision has only one fundamental pur- [fol. 939] pose and that is to give the price change wide publicity and to enable the trade to buy sugar at the old and lower price before the new price becomes effective. The price change will not get the wide publicity if the announcement is made later because the Dow-Jones ticker shuts down at 3:00 o'clock and most of the evening papers will not accept for publication anything that arrives after 3:00 o'clock. The 3:00 o'clock provision has not always had the same wording as it has today. It was originally adopted by the directors on February 7, 1928 and went into the Code February 17. (The provision will be found in the minutes of the directors' meeting of February 7, 1928 on page 19 of the bound volume.)

Repricing is only done on a price decline and means that if a refiner declines his price at any time during the day after the opening, he will go back and reprice at that new and lower price any contracts which have been submitted to him on that day and prior to the time he announced his lower price.

The original recommendation against repricing was eliminated by resolution at a directors' meeting on August 14, 1928, which was incorporated in the Code Interpretations in Section B on November 26, 1928.

The refiners have no uniform practice of announceing [fol. 940] price declines. Some say "effective immediately." Others say "effective today". Even though the announcement reads "immediately" it is understood it applies to all business received that day. The repricing provision was changed because of a purely mechanical difficulty. Under the 3:00 o'clock rule as it originally stood, and as long as the paragraph on repricing was in effect, any buyer would hesitate to place his orders until 3:00

o'clock when he knew there would be no further price changes, because if he put his order in at noon and there was a price change at 3:00 o'clock he would not get the lower price. The tendency on the part of buyers was to hold the orders until 3:00 o'clock and then put them in and swamp the refiners. If a price decline was announced effective the next day it particularly stopped all purchasing until that lower price became effective and, even with that provision, the 3:00 o'clock provision applied as far as the buyers were concerned because nobody is going to place an order for sugar today at noon with the possibility that at 3:00 o'clock some refiner would announce that effective tomorrow morning his price was going to be 10¢ lower. The buyer waited until he was sure the price was not going [fol. 941] to be lower and then placed his business.

There was a change in the 3:00 o'clock provision and the words "The day before the changed price became effective" were stricken out of that paragraph on February 14, 1929, as appears at page 226 of the minutes of the directors' meeting of that day. The initials I. C. R. mean Institute Code Rulings.

Prior to February 1929 price declines were originally announced to be effective the next day and since February, 1929, generally announced to be effective immediately or retroactively. The 3:00 o'clock notice provision, as originally adopted, provided that the first announcement of a change in price should be sent by the refiners to the executive secretary, he to notify the members. That did not mean that the refiners, upon announcing the price change, should inform the secretary and the secretary at the time should announce it to the other refiners. It meant the first refiner announcing the change should send it to the Institute and the Institute would relay it to all the members.

It was our original practice not to circulate all the announcements but only the first announcement.

Ordinarily we do not know whether or not a refiner is going to change his price unless he tells us. If we have [fol. 942] not heard from any refiner at the time of a price change, we assume that he is going to keep the old price, not that he is going to adopt the new one. During the past 4 years, with but 1 or 2 exceptions, refiners, who did not intend to follow a price advance, made no announce-

ment. There have been 10 or 15 instances during the life of the Institute that refiners have had to withdraw price advances because other refiners have not followed. If one stands pat the other 14 back down. They begin to back down at the time the new price is admitted to become effective if all refiners do not follow.

If there is a reduction they all follow promptly. No refiner who fails to follow can get any business. If a refiner announces a price decline retroactive to the opening of business that day, he cannot back out because other refiners do not follow. If somebody does not follow the advance they all have to go back to the old and lower price. There has never been an instance where a refiner did not follow a decline.

At the directors' meeting of March 15, 1928 the executive secretary reported that he was convinced of the necessity and practicability of notifying every member of the action of every other member on a price change and had done so on the price change of March 14.

[fol. 943] The Code Interpretation which provided that the first announcement shall be sent to the executive secretary, he to notify the other members, was dropped from the Code Interpretations on November 26, 1928, but it died in practice just after March 15.

When we first began the practice of putting out the changes in Code Interpretations we sent out mimeographed sheets. The first two were not cumulative. Then we decided they would be too cumbersome and we made them cumulative. Finally we adopted the loose-leaf system. We would put a resolution in the Code Interpretations whenever it was adopted but reprinting only one sheet became expensive so we had printing done only when there was a sufficient volume to make it worth while. We did that every 2 or 3 months.

A change in the Code Interpretations goes into effect when it is passed by the directors of all members, including those not present, vote for it. Anyone who objects to a change in a Code Interpretation and wants a hearing before the board of directors gets it. The Code requires members who were present at a meeting and voting for something to abide by their votes for 10 days. Those who are not present are sent the minutes of the meeting advis-

[fol. 944] ing that everybody voted for this or against

that and are asked to let us know within 15 days whether or not they would agree to that recommendation. If they did not agree then the whole thing became null and void at the end of the 15-day period or, rather, never having been in effect, does not go into effect until the 15 days have expired.

All members did not notify the Institute of price changes. C. & H. has never notified us. We get information as to their price changes through their brokers, Daub & Carr, who are sugar brokers with offices in New York. We send announcements to all the members except C. & H. and we sent them to C. & H. for a short time until requested to stop.

Defendants Exhibit M-3 was received in evidence.

From my experience and knowledge of the trade I know that the price change announcements for various refiners receive swift publicity throughout the trade outside of the information received through the Institute. There has never been a price change on which we have not received numerous telephone calls from various members, asking why we have not sent some refiner's announcement before we got the announcement in question and the wire in ques- [fol. 945] tion would very clearly indicate the public information was received first. I know through my contact with brokers and the trade that members get the price change announcements quickly from sources other than the Institute. A number of brokers have told me that they receive the information from other sources long before they receive it from us. The Institute sends out these price notices merely to report accurately and in the exact words the announcements of the refiners, since in many instances they become extremely complicated.

I have prepared Exhibit 0-3, a chart of price changes. The heavy black line represents the price of refined sugar. The width of the line is proportionate to the number of refiners who have announced any particular price. The data was taken directly from the wires sent by the refiners to the Institute. The notices were also taken from these price change wires.

The second line is Willett & Gray's daily quotation for raw sugar, taken from their annual number. The little bars at the bottom are the daily sales of 14 refiners in 1928.

It is the total for the industry as a whole although one refiner was unable to give us those figures. The figures at [fol. 946] the top of these bars are the apparent margin, in other words, Willett & Gray's raw price subtracted from their refined price for that day. This is taken entirely from Willett & Gray.

The first price change after the Institute started was on January 30. At that time there were 2 prices, one in guaranty territory, which is the same in the Middle West and the other in eastern and southern territory, which is 10¢ higher. Guaranty territory is that territory in which the refiners sell on what they call a guaranty contract, carrying a provision that if the price of sugar goes below the price named in the contract the buyer has a right to have any undelivered portion of that contract repriced at the lower price during the 30-day contract period.

On January 30, 1928, C. & H. dropped their price 10¢ and that was followed by all refiners in both territories. On February 16 Godchaux dropped their price, which was for non-guaranty territory, to the same level as the C. & H. price in the guaranty territory.

On February 24 a refiner announced a .05 advance to 5.65, effective on the opening of the following day. That was generally followed except as shown. Revere delayed [fol. 947] the advance a day. C. & H., Western, Imperial, Henderson and Federal did not make any announcement. Godchaux advanced its price to 5.65 except in the C. & H. guaranty territory. Henderson the next day announced an advance to 5.65 effective February 27. Revere announced that, instead of going up in their territory, they would advance .05 east of the Pittsburgh-Buffalo line and would remain at the old price west of that line.

On February 29 Revere announced an advance effective March 1. American announced an advance effective March 1 and was followed by National, Pennsylvania, McCahan, Godchaux, Colonial, Henderson and C. & H. These are the same refiners who made no announcement on the 24th.

Revere made a second announcement and advanced its price .05 west of the Buffalo-Pittsburgh line. On March 1 Western advanced to 5.75, which was .15 higher than the original price and .10 higher than the first part of this announcement. Revere advanced to 5.75 and still kept that Buffalo-Pittsburgh line, the 5.75 price being effective only

east of that line. Then American advanced the price to 5.60 in Texas and Oxlahoma alone. Federal then advanced the price to 5.70 which was .05 below the price that Western had announced effective the day after Western had an-
[fol. 948] nounced it. Savannah and Imperial also advanced to 5.75. On March 2 Revere advanced to 5.75 in all territory effective March 2.

There is a 10¢ difference between the guaranty and non-guaranty territory up to February 17, but none after that.

Mr. Higgins: The explanation why the price is lower in the guaranty territory is a very simple one. Only a few of the refiners were guaranteeing in this guaranty territory. Most of the refiners were not guaranteeing so naturally, in order to meet the guaranty and carry on competition, they were fighting with the lower price in that territory against the refiners who were guaranteeing. They made it difficult for the refiners who were guaranteeing.

By Mr. Peck:

That line is Federal. Federal sold 5¢ below the other refiners on that move and maintained that advantage for some little time. On March 14 National announced an advance of 10¢ which was made by all refiners except Federal. Federal advanced the price 10¢ leaving it still 5¢ below the others. On April 2 Godchaux announced an advance effective on the opening of business April 4. Western, Imperial, Federal and Arbuckle, all delayed that advance one day. Arbuckle and Federal stayed 5¢ lower than the other refiners. That condition continued until the end of May. Then Arbuckle and Federal both advanced the
[fol. 949] price 5¢ to come up to the price of the other refiners. On May 24 National announced another advance of 10¢ effective on the opening of business May 25. This was followed, some refiners delaying it a day and Arbuckle staying 5¢ below the others. It is rather interesting to note that that is the period of highest margin and there was no sugar sold at that 6.10 price.

By Mr. Fly:

There was some sugar sold at 6.10. We can determine that sales are made on the second day at the old price and not the new advanced price, because they are sales that are

sent to the refiners by night letter at the end of this day which was the end of the 24th but not received and confirmed by the refiners until the 25th. There was nothing but my general knowledge of the conditions that enables me to say with certainty that the sales indicated on the day after the price change are at the old price. We have from the refiners' own records a statement as to the price at which the sales were made but we have not used it in computing this chart. I have checked it casually with the price announcements here. If you look at any refiner's daily sales you will find on the second day and, as a matter of fact, generally for 4 or 5 or 6 days after that, all their [fol. 950] business will invariably be at the old price. The reason there will be no such volume of sales as indicated at the higher price is because everybody could buy all the sugar he wanted for 48 hours or more at the lower price. In this particular case they would have from the 24th, the date of National's advance, until the opening of business the 25th. In the next they would have from June 26 to the opening of business on June 27. In the first 2 or 3 days of the high price buyers never rushed in to buy at the new price. That is perfectly obvious from these lines. You will find immediately after an advance there is no sugar sold, unless you get a long period when a 30-day contract expired. Then you begin to pick up a little spot business, but that is very small comparatively.

By Mr. Peck:

On June 22 Pennsylvania announced a decline of 10¢ which was followed promptly by all refiners. On June 25 Arbuckle announced another decline of 20¢ for one day only. Arbuckle used to and still does have what they call "bargain days". They would drop the price one day and push it up the next. Most of the other refiners did not like it because Arbuckle almost invariably announced the decline but not the advance. As a matter of fact that did [fol. 951] not happen in this case, but it generally does. All the refiners followed Arbuckle. Pennsylvania followed his bargain day on the way down but did not not follow his advance.

On the 27th American announced their 5.70 price would not become effective in guaranty territory. This was fol-

lowed by all of the refiners who sold in guaranty territory, but at that time all refiners were not selling there.

I have made a more detailed analysis of the price change of June 25. The information in Exhibit N-3 was obtained from wires containing price changes. It is more detailed than the chart.

Defendants' Exhibit N-3 was received in evidence.

The effect of an announcement, such as declining a price for one day only, is merely an effort to move sugar. A 30-day period had elapsed and apparently Arbuckle thought they ought to be selling some spot sugar but they were not, so they put the price down and up again. The sugar was sold at the lower price. If the Arbuckle announcement had been followed, the price would have gone up again. The move took place at 5.80 as Arbuckle announced but the price, instead of going up to 6.00, only went up to 5.90. Federal dropped .05 along about July 9, [fol. 952] although it is not shown in the notes.

On July 13 Godchaux announced a decline of 10¢ effective at the opening of the 16th and all refiners followed that except Federal which still maintained the 5¢ advantage.

On July 25 Henderson announced a decline from 5.80 to 5.60 effective at the opening of business July 26. This was followed by all refiners, Federal still maintaining its 5¢ advantage. The decline was due to the drop in the raw market.

Arbuckle on August 1, announced a decline from 5.60 to 5.45 effective at the opening of business August 2 for that day only. That was another bargain day. Federal announced a decline to 5.40. Pennsylvania followed Arbuckle's decline but did not limit it to one day. This was followed by all refiners except Arbuckle and Federal.

On August 2 Arbuckle announced an advance from 5.45 to 5.55 effective at the opening of business on August 3. This was followed by all refiners except Imperial, Western, Colonial and C. & H. who delayed the advance until August 4. All 4 of those refiners sell the bulk of their output in guaranty territory. National announced that they would delay the advance in guaranty territory to August 4, followed by all of the refiners selling in that territory. The

[fol. 953] fact is the price went up in non-guaranty territory the day before it did in guaranty territory. There was business done at 4:30 in the afternoon. The eastern refiners were open for another half hour, the New Orleans refiners were open an hour later and the Pacific Coast 3 or 4 hours later.

On August 16 Godchaux announced an advance of 10¢ effective at the opening of business on August 17. This was followed by all refiners except Federal who made the 5.65 price effective at 1:00 P. M. August 17 instead of at the opening. In other words they delayed it for 5 hours.

Then the next change was on September 14, when Arbuckle announced a decline of 15¢ effective at the opening of business September 17, 3 days later. This was followed by all refiners.

On September 27 Federal announced a new 7-day guaranty contract. This new contract was followed by National, Pennsylvania and McCahan.

Arbuckle had always been very much against guaranties, so he promptly announced that his price would be 5¢ below that of anyone who guaranteed. The result of that led to the quoting of 2 prices by all refiners. Federal's guaranty was effective only on spot business. In other words, a refiner would guarantee for 7 days only. A buyer would have to send in the specifications to get the sugar [fol. 954] out right away, which is equivalent to what is known in the trade as a spot contract. So all the refiners, Arbuckle having announced his price at .05 below that of any refiner who would guarantee, quoted 2 prices, one for the guaranty contract .05 higher than the one for 30-day contracts. That left Arbuckle with his price .05 below the guaranty contract price, and it left all refiners quoting 30-day contracts at a price which was .05 below that of the guaranty contracts. There were only 4 refiners who followed. The quotation lasted for several months. The announcements during that whole period of the life of this type of contract were very complicated because of the Arbuckle announcement and for brevity, announcements pertaining to that situation have been omitted. Everybody's efforts not to have to sell all their sugar .05 below Federal's guaranty contract made possible these 2 prices.

Federal kept that guaranty contract until it went out of business. Refiners, who had followed Federal, withdrew.

On October 9 Arbuckle announced a decline for one day only, followed by Colonial. National followed Arbuckle, but only in non-guaranty territory. At that time Arbuckle was not selling in guaranty territory. For a third time [fol. 955] Pennsylvania announced a decline to 5.20, Arbuckle's price. Revere announced the 5.20 price but did not limit it to one day, following Pennsylvania. C. & H. announced a decline effective October 9 instead of October 10 as Arbuckle had. C. & H. was followed by Western and Imperial, both of whom were selling their entire output in the C. & H. territory. Eastern refiners followed C. & H. in the guaranty territory. If Arbuckle's announcement had been followed, the price of refined would have gone down to 5.20 and then promptly up to 5.40 again. Actually, it went back to 5.25 in non-guaranty territory.

Arbuckle put the price back only to 5.25 but their original intention on October 9 was to announce a decline of one day only from 5.40 to 5.20.

On October 10 Arbuckle announced an advance of .05 effective the 11th. On the day Arbuckle's price was to become effective Colonial announced they would not make any change in price in guaranty territory. This was followed by all refiners selling in guaranty territory.

On October 15 C. & H. announced an advance from 5.20 to 5.25 effective October 16. That was met by all refiners selling in guaranty area and brought the 2 prices together again.

On October 29 Arbuckle announced a decline from 5.25 to 5.10 effective at opening October 30 which was followed by Revere and Savannah. National announced a decline [fol. 956] for non-guaranty territory only, followed by Pennsylvania, American, Federal, Henderson and Godchaux. Revere, Savannah and Arbuckle sold very little sugar in guaranty territory at that time. This was followed by Pennsylvania, American, Federal, Henderson and Godchaux. McCahan announced a decline and added "we shall consider contracts bearing our usual guarantee clause." They did not say definitely that they would accept contracts but merely said they would consider them. Evidently that was enough, for C. & H. promptly announced a decline in all territory and was met by all refiners.

On November 10 Pennsylvania announced an advance from 5.10 to 5.20. Several refiners followed. National de-

layed it for a day. Godchaux further delayed the advance in guaranty territory until November 14. The outcome was that all refiners announced an advance effective in non-guaranty territory November 13 and in other territory November 14.

On November 27 Arbuckle announced a decline from 5.20 to 5.15 effective November 28, advancing November 29 to 5.25. Federal followed Arbuckle but limited the change to non-guaranty territory. Pennsylvania followed Federal. McCahan announced 5.15 in all territories beginning November 28. C. & H. announced 5.15 effective November 27. [fol. 957] Eventually all refiners announced a decline to 5.15 for November 27 in guaranty territory and November 28 in non-guaranty territory, followed by advance to 5.25 November 29 for all territories.

On January 3, 1929, Arbuckle announced a decline in price of 10¢ effective at the opening of business January 4 followed by all refiners. On the same day Spreckels followed Arbuckle in the eastern territory but made the price in guaranty territory effective a day earlier. This was also followed, some refiners making the announcement on the 4th retroactive to the 3rd.

On January 7 American announced an advance [illegible] effective at the opening of business January 8. Savannah followed. That was the advance from 5.15 to 5.20. C. & H. announced a decline to 5.00, which is 15¢ below the price at which American started their advance and, effective at the opening of business January 9, an increase to 5.15. That was back to the old price effective at the opening of business January 10. American withdrew the advance. Spreckels met C. & H. Colonial announced the decline to 5.00 but did not announce the increase. Imperial followed C. & H. as did Godchaux, Pennsylvania, National, Savannah, changing their former announcement, and American, McCahan, Western and Henderson. Then Colonial an- [fol. 958] nounced that it would accept business at 5.00 until the opening January 10 in all territory going firm at 5.15 on the 10th. On January 10 Arbuckle announced a reduction from 5.15 to 5.05, effective at opening of business January 11, followed by National, Henderson and American. Spreckels announced the 5.05 price for eastern territory but not for guaranty territory. Godchaux followed Arbuckle as did all other refiners including Spreckels.

Then Arbuckle announced a reduction from 5.05 to 5.00, effective January 17 only, followed by Savannah and Henderson. Pennsylvania announced the 5.00 price but did not limit it to one day, the fourth time it did that, followed by American, National, Colonial, McCahan, Godchaux, Revere, Imperial, C. & H. and Western. Spreckels announced the 5.00 price but did not apply it to guaranty territory.

On the 17th, a day later, Arbuckle announced an advance from 5.00 to 5.10 effective at the opening of business on January 18, followed by National, American, Pennsylvania, McCahan, Savannah and Revere.

Federal announced the 5.10 price but did not apply it to guaranty territory.

Godchaux announced the 5.10 price but made it effective at the opening of January 19. Pennsylvania announced [fol. 959] that they would delay the advance in guaranty territory until January 19, followed by American, National and McCahan. They announced that for one day only and advised they would give another announcement later of their changed price.

Arbuckle's 10¢ advance was followed by National, American, Pennsylvania, McCahan, Savannah and Revere.

Federal announced the 5. price but did not apply it to guaranty territory.

Pennsylvania announced they would delay the advance in guaranty territory until the 19th, followed by American, McCahan and National. Finally all refiners followed Godchaux and the advance became effective in all territories January 19.

On February 13 C. & H. announced a decline from 5.10 to 4.90, 20¢, effective at the opening of business that day and all refiners followed.

On March 4 Imperial announced a decline from 4.90 to 4.75 effective at the opening of business March 5 and then advanced to 4.90 effective March 6. Colonial announced a decline but did not announce the advance and Colonial was followed by all the refiners including Imperial, which changed its notice.

On March 6 National advanced from 4.75 to 4.90 effective at noon that day. This was followed by all the refiners, [fol. 960] the effective time being delayed from the morning of the 6th to the opening of the 7th. On that move more sugar was sold than on any buying move we have any record of. Apparently the reason National made it effective

at noon instead of waiting until the next morning, was to stop buying. Refiners sold about 19,000,000 bags of sugar in 2 days.

After buying that much, no one wanted any sugar until May 9. On that day Godchaux announced an advance from 4.90 to 5.00, effective at the opening on the 11th. Godchaux was followed by American, Pennsylvania and Savannah. Then C. & H. announced a decline from 4.90 to 4.75, effective at the opening of business May 9, and advancing to 5.00 at the opening on May 11, followed by all the refiners in the territory in which C. & H. were selling.

On May 10 National spread the 4.75 to all territories advancing 5¢ May 11. The buying move took place at 4.75.

On June 18 Godchaux announced a decline of 15¢, immediately followed by all refiners. On June 24 the raw market was going up very rapidly and Godchaux announced an advance from 4.85 to 5.00, effective at the opening on the 25th. C. & H. announced the advance but made it effective in guaranty territory a day later and was followed by all refiners, with the result that the 5.00 price became effective [fol. 961] outside of guaranty territory on June 25 and within guaranty territory on June 26.

The raw market still going up, Spreckels, on July 8 announced an advance from 5. to 5.25 effective the morning of the 9th. Henderson followed on the 10th. Henderson's announcement was followed by all refiners. On June 22 Spreckels announced another advance from 5.25 to 5.50 effective at the opening July 23. This was followed by Pennsylvania, Savannah and Arbuckle. Then American announced an advance but made it effective a day later. This was followed by all refiners and those who had announced the change for the 23rd changed their announcement. Here again you have a top price with an operating margin and no sales.

On September 4 Arbuckle announced a decline from 5.50 to 5.30 effective at the opening of September 5 and an advance of 5¢ to 5.35 effective September 6. Pennsylvania and Savannah followed. National followed the decline but not the advance and all the refiners followed National, including those who had announced the advance. They went back and changed the advance. The advance did not go into effect at that time and no sales were made at that price. On September 9 American announced an advance from 5.30 to

5.40 effective at the opening on the 11th, and all the refiners [fol. 962] followed. In the meantime the raw market had gone up about 12¢ above where it was when Arbuckle tried to make their announcement before. On September 24 Arbuckle announced an advance from 5.40 to 5.50, effective at the opening on September 28, followed by all the refiners. Again the raw market had gone up about 8¢ or 9¢.

On October 25 C. & H. announced a decline of 25¢ from 5.50 to 5.25, effective at the opening of business on that day. This was followed by Texas, Imperial, Western, Colonial, Godchaux, Savannah and Henderson.

On October 25, 1929, there was a divergence. All of the refiners announced that decline and sold most of their sugar in guaranty territory. There is little they sell in southern territory. None of them get in eastern territory, so that most was sold in the territory in which those refiners were selling and not in the eastern and northeastern part of the country until October 30, when American announced a decline effective at the opening of that day. That was followed by several refiners and then Pennsylvania announced that decline retroactive until October 25, as indicated on the lowest line, which brought all the refiners together again on the 25th, although some of them did not make the announcements until the 30th.

[fol. 963] A decline never has any effect on the sale of sugar. There is a little spot business sold from day to day but it does not amount to very much.

On November 19 Henderson announced a decline and most of the refiners followed. C. & H. pushed it ahead a day and all followed.

On December 16 Godchaux announced an advance of 20 points, from 5 to 5.20, effective at the opening the 17th. This was followed by Pennsylvania, Henderson, Savannah, Imperial and McCahan; and then Arbuckle, instead of announcing 5.20, announced 5.10 for prompt shipment and 5.15 for 30-day contracts. That was followed by American and National. Then Spreckels announced a 5.10 price for non-guaranty territory only. Revere announced the 5.10 price for all territory, effective December 18. C. & H. went 5¢ further than Revere had gone and announced 5.15 price effective the same day.

The outcome of all these announcements was that all the refiners with a few exceptions announced 5.10 for prompt

shipment, which is shipment within 7 days, specifications to accompany order, and 5.15 for 30-day contracts effective on the 18th. The exceptions were C. & H., Imperial, Revere, Texas and Western, who announced a straight 5.15 price. They did not make the 5¢ lower price for spot busi- [fol. 964] ness. Pennsylvania announced a 5.20 price and did not change it.

This line above is Pennsylvania. Pennsylvania left their price 5¢ above the other refiners until September 20 when they came down to 5.15 for 30-day contracts and 5.10 for prompt shipments. We have not shown the 5.10 prompt shipment line on this chart because we did not want to complicate it any more than was necessary. On the same day Revere dropped their price 5¢ below the other refiners.

The chart of 1930 ties right on to the end of 1929 and begins the year showing Revere 5¢ below the other refiners. On January 6 Pennsylvania announced a 5¢ decline, bringing them down to Revere's price, and this was followed by all the other refiners. Then on February 5 C. & H. announced a decline of 20 points from 5.20 to 5, effective that day, followed by all refiners.

On February 10 Arbuckle announced a further decline of 5¢ retroactive 2 days before C. & H. had announced the previous decline. By "retroactive" they went back and repriced all business they had received from February 3 on to the lower price. This was followed by all the refiners except Savannah and Colonial. Savannah announced the same basis price but moved it clear back to January 5. That is the long line back to January 6 so that all this business [fol. 965] which was sold on this advance to 5.20, or rather from 5.10 to 5.20, which would amount to 3,500,000 bags of sugar, was repriced at 4.95. They sold altogether roughly 3,500,000 bags of sugar, which was all repriced 15¢ lower than the price at which it had been sold. Savannah made the first announcement and then Colonial tried to hold it in the territory where they competed with Savannah. Then Godchaux broke it down to all territories.

On March 4, after a big drop in the raw prices, Revere announced a drop of 10¢ from 4.95 to 4.85, followed by all the refiners. Three days later C. & H., on March 7, went down another 15¢ to 4.85 and also announced an advance of 5¢, effective at the opening of business on March 8. At that point the price announcements got mixed up with a

freight charge and they do not all read the same. Some of the refiners made a price of 4.85 less a 15¢ freight allowance, which brought them down to 4.70. Other refiners merely announced 4.70 without announcing the freight allowance. The C. & H. announcement of the advance of 5¢ was followed by all refiners.

The next move was April 2. They had sold a tremendous volume of sugar. There is a little over 9,000,000 bags the first day, about 3,500,000 the second and a little over 2,000,000 the day after that. Then the trade was un- [fol. 966] able to take sugar out. At the end of approximately 30 days there was still a good deal of sugar on hand which the refiners had not been able to force on their trade; and on April 2 National announced that they would extend the time of contracts entered on March 7, for 30 days, and that they would permit buyers who had underestimated their requirements to purchase additional amounts at the old price.

Arbuckle followed the same plan as National except they dropped the price, but went down to the same basis that these March 7 contracts had been entered. Spreckels again, as has been its practice all along, tried to hold it in the eastern territory only, without going out into guaranty territory. Then National broke it down all over the country and the final result was that all the refiners made a price of 4.85 less .15 freight allowance and extended the time 30 days.

On May 21 Revere announced a decline of .20, raw still going down, without giving an effective date. National announced the 4.70 price effective immediately in non-guaranty territory only.

National was followed by Pennsylvania and several other refiners who were mostly selling in eastern territory. [fol. 967] Then C. & H. announced a 4.70 price in all the other territories and all refiners had to follow suit.

On June 6 the Revere announced an advance from 4.50 to 4.60 effective at the opening of business June 9. Revere was followed by several refiners. Then Spreckels, one of the refiners following them, suddenly withdrew the notice of their advance and changed to the old price. American, in spite of Spreckels' withdrawal, made the advance to 4.60 effective June 10, which was a day later than Revere had made it effective.

The raw market had risen about 12½¢. American was followed by practically all the refiners. Then Colonial announced an advance effective June 9 and later withdrew their announcement. On June 9 Imperial again withdrew their announcement of the advance and all refiners who had announced the advance followed so that the changed prices never went through and there were no sales to amount to anything during that period. During the 60 days there were no buying movements and the trade naturally needed sugar.

On June 13 C. & H. announced an advance of 10¢ and was followed by all refiners. On June 14 American announced a still further advance from 4.50 to 4.70, changing their first announcement of the 13th but, instead of stopping at the 4.60 price, went up to 4.70. This was followed [fol. 968] by C. & H., Colonial, Imperial, Savannah, Texas and Western. That left these refiners 10¢ above the others.

On June 27 C. & H. announced a decline to 4.60, the price that the other refiners had maintained during that period, and all of the refiners who had announced an advance to 4.70 followed.

On June 27 C. & H. also announced an advance from 4.60 to 4.70 and all refiners followed. If any of those other refiners who were up at the 4.70 price had protected the ones who were at 4.60, without coming down first, this bunch of refiners would have gotten all of the business and the others would not have obtained any.

On August 6 Arbuckle announced a decline of 10¢ from 4.60 to 4.50 and next announced an advance from 4.50, going back to their old price at the opening of business the day following the decline. That was followed by 8 refiners. Then National announced the decline and did not announce the advance. National was followed by all refiners. Arbuckle came down a day later. The big line is the Arbuckle advance which was announced on that day and then rescinded. The advance never became effective. There were no sales at that price.

On October 19 Arbuckle announced a decline effective at the opening on the 20th and was followed by 6 refiners, in- [fol. 969] cluding Spreckels. Later they announced a price of 4.40 on the 19th instead of the 20th and practically everybody followed them. Some of them were made on the 20th and made retroactive to the 19th. On August 20 God-

chaux announced a still further decline of 5¢ and all the refiners followed. The raw market had fluctuated but little during the period. On August 20 Pennsylvania announced an advance of 15¢ to 4.50 effective the 20th, followed by American, Savannah and Colonial. The same day Pennsylvania postponed the advance a day and that was followed by the same refiners who had followed them the first time. On August 31 American changed their announcement of the advance and were followed by Pennsylvania, Savannah, Western and Colonial and the advance was never effective. On August 27 Savannah announced an advance and all refiners followed it, except Spreckels who had stopped milling, and continued the 4.35 price until they had disposed of all the sugar they had on hand. We have shown it on this chart.

On September 25 C. & H. announced a decline and all refiners followed. On October 8 National announced an advance from 4.35 to 4.45, effective on the 9th, and was followed by Pennsylvania and later National postponed their advance a day and all the refiners met National.

On October 10 Godchaux announced an advance from [fol. 970] 4.45 to 4.55 effective on the opening of the 11th. This was followed by Pennsylvania, Arbuckle and Savannah. Then C. & H. announced that in their opinion the raw market did not warrant an advance and nobody else did anything. That left Godchaux, Pennsylvania, Arbuckle and Savannah .10 higher than the rest of the refiners, and it was a foregone conclusion that those 4 would have to reduce their price before the other refiners advanced theirs so on October 14 Revere announced an advance and the 4 refiners who had gone up announced a decline. If they had not done that they would not have obtained any business.

On October 23 (during all this period there being a very sharp rise of .45 in the price of raws) Godchaux announced an advance. Eight refiners followed. National postponed the advance to the 25th, Godchaux having made it effective on the 24th, and it was followed by 5 refiners who had announced October 24 and two additional refiners. C. & H. announced a price .10 higher. Godchaux' original announcement went from 4.55 to 4.65 and C. & H. pushed it to 4.75 effective at the opening of business on the 25th. All of the refiners followed except Arbuckle who had an-

nounced 4.65. He did not change that announcement but stayed at 4.65 until November 17 when he announced an [fol. 971] advance to 4.75. In the meantime the National announced a decline from 4.75 to 4.65 beginning at the opening that day and an advance of 4.65 to 4.75 effective November 17. That again was a foregoing conclusion that those refiners would have to come down before they permitted Arbuckle to go up. Otherwise Arbuckle would have obtained all the business.

On December 15 Godchaux announced a decline from 4.75 to 4.65 and everybody followed it, the raw market having gone down slightly. On December 22 Western announced a further decline to 4.55 and was again followed by all the refiners. On January 6 Pennsylvania announced an advance, there having been pretty nearly a .15 jump in the raw price since the first of the year, from 4.55 to 4.70 and was followed by all the refiners.

On February 9 C. & H. announced a decline, the raw market having dropped, from 4.70 to 4.50, effective the opening day and was followed by all the refiners.

On March 5 Pennsylvania announced a decline, the raw market having again sharply declined, from 4.50 to 4.40, [fol. 972] and also announced an advance to 4.50 on March 7. This was followed by Arbuckle, Savannah and Revere. That never became effective. National announced a decline, but did not follow the advance, and was followed by all the refiners except those who announced the advance.

On March 6 (that was the day before the price was to become effective), Pennsylvania withdrew the advance and was followed by Arbuckle and Revere. On March 19 American announced an advance from 4.40 to 4.50 to become effective on the opening of the 21st. This was followed by Pennsylvania, Savannah, Western, Godchaux, Texas, Imperial, McCahan, National, Arbuckle and Henderson, that is, 11 refiners altogether announced that advance. Then C. & H. again came out to their trade with the announcement "C. & H. making no advance. Waiting until trend of raw market more definitely defined." That again was not made to the Institute. It was made to their trade at large and the Institute got it through C. & H.'s broker on March 20. That was followed by most refiners. Arbuckle, one who had announced the advance, announced a price of 4.35. In other words, he withdrew his advance and went 5¢

lower than he had been before March 21, only advancing to 4.40 on the 22nd. The Arbuckle announcement read in part:

"Present cost of refiner's stock plus yesterday's trend from the raw market fully justified the announced advance [fol. 973] to 4.50 owing to this unexpected break in refined has left us without orders for prompt shipment."

Late that afternoon National announced a decline to 4.35 until further notice. That left Arbuckle without his advance and National was followed by all refiners, Arbuckle making a new announcement withdrawing his advance.

On March 24 C. & H., feeling a little better about the raw market which had gone up, announced an advance from 4.35 to 4.50 effective at the opening on the 26th and was followed by all the refiners except Arbuckle. Arbuckle only went to 4.40 instead of 4.50 and on March 27 announced an advance to 4.50 effective at the opening of March 29.

On April 23, Pennsylvania made an announcement that they would extend the time of delivery of the March 25 contract. A great deal of sugar was sold on that move. This was followed by Western and C. & H. on the 24th. Pennsylvania's action did not affect the price. It merely said that they would let the buyers have a longer time to get the sugar; but on the 24th National also extended the time of the contract and made a decline to 4.40 effective immediately and that was followed by all refiners.

On May 18 Pennsylvania announced an advance from 4.40 to 4.50, effective at the opening May 20. This was [fol. 974] followed by Savannah and Godchaux. Within a half hour Godchaux withdrew their advance and notified the Institute by night wire, which was not received until the 19th. Godchaux' advance had been made late in the afternoon of the 18th. Having an hour more down in New Orleans, they withdrew it after the New York market had closed so they sent it by night letter. On May 19 Imperial announced a decline instead of the advance, from 4.30 to 4.45, and was followed by all the refiners, those who had announced the advance withdrawing it.

On June 1 C. & H. announced an advance from 4.35 to 4.45 and everybody followed it.

On June 18 American announced an advance from 4.45 to 4.55 effective at the opening on the 20th. This was fol-

lowed by 8 refiners. C. & H. announced the advance, but also announced a decline to 4.40 effective June 18. This was followed by all the refiners, those who had announced the advance withdrawing it, but first making a decline.

The result was that while American had tried to stimulate a buying movement at 4.45, the buying movement actually took place at 4.40. The raw market advanced all through that period.

On July 1 American announced an advance from 4.55 to 4.65 and everybody followed. On July 20, the raw market [fol. 975] still going up, Revere announced an advance from 4.65 to 4.75 and everybody followed. Then the raw market started down, and on August 25 C. & H. announced a decline from 4.75 to 4.60, followed by all refiners. Then the raw market took another small drop and C. & H. again announced on September 3 another decline retroactive to the opening of business September 3, from 4.60 to 4.55, which was again followed by all the refiners.

On September 29 National made the following announcement:

"In view of the impossible situation created by competing announcements, effective territory in the vicinity of Cleveland, Ohio, and Detroit, Michigan, and the obvious discriminations resulting to customers located in other territories, effective as of the opening of business today and until further notice we will make an allowance of five cents per hundred pounds on all business in all territories."

That is equivalent to reducing their basis price 5¢. I do not know why they chose that form instead of the other. This announcement was followed in effect by all the refiners except Arbuckle. Arbuckle came down a day later.

At that point, again, some of the refiners announced a 5¢ allowance and some of them merely dropped the price 5¢.

Arbuckle came down a day later. That is not on the chart. I have the notes. Arbuckle made it retroactive so in effect it all came back to the same point.

[fol. 976] On October 2 American withdrew the .05 allowance and reduced their price to 4.50 in non-guaranty territory but kept the 4.55 and the .05 allowance in guaranty territory. Again American's announcement was followed in effect, some of them keeping the .05 allowance, some not. On November 6 National announced a decline from 4.60 to 4.50

effective at the opening, followed by 9 refiners. Half an hour later National changed their announcement and made their price in guaranty territory 4.55 less .05, and that was followed by the same 9 refiners.

The switch of National's did not actually affect the price. It merely made an allowance in part of the country and no allowance in the other and made the price where they had the allowance .05 higher than where they did not.

On November 20 National announced the withdrawal of the .05 allowance in guaranty territory and the reduction of their price to 4.50 instead of 4.55 less .05. That left the price right where it was before. This was followed by McCahan. Western made the announcement and then cancelled it. On November 30 Imperial announced a decline from 4.50 to 4.40 on carload lots retroactive to November 20. They made no change in less than carload lot withdrawals. [fol. 977] C. & H. made essentially the same announcement as Imperial, but withdrew the .05 allowance in guaranty territory, and was followed by Colonial.

On December 1 National reduced their price to 4.40, retroactive to November 30, with no allowance or difference in price between carload and less than carload deliveries. Savannah followed the C. & H. announcement. Godchaux and Colonial followed National, withdrawing all announcements and changing their former announcements, as did Savannah, Pennsylvania and Arbuckle. American announced a 4.40 price in non-guaranty territory, effective November 30, at 4.45 less .05 in guaranty territory, the latter price retroactive to November 30 on carload deliveries. McCahan followed, except that they made the 4.40 price effective November 27 in guaranty territory, but no allowance on carload orders.

On December 2 C. & H. made the 4.45 less .05 retroactive to November 20, working it back a bit, in guaranty territory, and applied it to all deliveries, instead of only carload deliveries. This was followed by a number of refiners on the 2nd and 3rd.

On December 8 C. & H. pushed the effective date back to November 17 instead of the 20th in guaranty territory. [fol. 978] That was followed by everybody either at the 4.40 or 4.45 less .05.

On December 10 C. & H. reduced its price in guaranty territory and kept the .05 allowance. Three refiners fol-

lowed C. & H., keeping the allowance, and 11 followed but without retaining the allowance.

Defendants' Exhibit O-3 was received in evidence.

Godchaux' daily sales figures are not included in the chart for 1928, 1929 and 1930 because their records were not available. The chart for 1931 includes the figures of all refiners.

Exhibit P-3 is a chart showing the apparent margin and actual daily sales of 14 United States refiners for the year 1928. The bottom set of bars is identical with the one on the other chart except they are larger. The top broken line there is the daily apparent margin, which is the difference between Willett & Gray's raw prices and their refined prices on each day. They do not actually quote that margin but merely give the 2 prices and we subtract one from the other to arrive at that result. The top line is a graph of what is shown in Willett & Gray of the figures for the day. The bottom figures as to daily sales are identical to the ones [fol. 979] on the prior chart. This shows only one thing—that every time there is a sale of sugar there is a very low margin. The volume of sugar is sold upon a low margin, differing in the scale of price changes. This is perfectly obvious because the only time a sale takes place is when the refiners advance their price and the only time they advance their price is when the margin is low. The sale takes place when the margin is low and then it promptly rises. The raw sugar is purchased at the higher margin which is bad for the refiner why buys on the high and sells on the low.

The other charts show the same thing—that the margin is always pretty close to the bottom when there is a sale of sugar. The lowest margin exists at the time of the biggest sale of sugar for the year and the next biggest sale is the next lowest margin. The trade watches the margin pretty closely. When you have 3 moves pretty close together you find the trade still has raw sugar on hand.

Willett & Gray, in computing their annual margin figure, give the same weight to the large apparent margin on a day when no sugar is sold as they do to the smaller margin on a day when large amounts of sugar are sold.

[fol. 980] Defendants' Exhibit P-3 was received in evidence.

In connection with price changes, to my knowledge, members of the Institute's staff have not at any time endeavored

to influence any refiner as to his price announcements or as to whether he should initiate or follow a price change.

I would probably know of any such action on the part of any executive of the Institute who worked closely together. At no time has any refiner asked me or, to my knowledge, any other executive to intervene with any other refiner as to a price change or as to avoiding a price change.

With possibly one or two exceptions I have attended all Institute meetings since 1929 and several of them before that time.

Prices or price changes have not been discussed at those meetings. I do not know of any effort made by the Institute in any connection to influence or to affect prices or price changes or price change announcements aside from the circulation of these price change announcements.

[fol. 981] Cross-examination.

By Mr. Fly:

The class of information which we received and sent out includes differentials on one or two manufacturers' grades of sugar, freight changes, changes in warehouses and changes in brokers. All of these changes came under the head of "statistical reporting". We did not treat any of them exactly as we treated price changes, which were all wired out. Other changes were sent out by letter or air mail. Since the volume of freight changes has increased so rapidly, we have treated these more or less as price changes. Possibly the first 2 or 3 announcements which we receive we sent out by wire. After that any refiner's announcement would go out by mail. The Institute sent out all delivered price announcements which were made around April 27 to April 30, 1929, when delivered prices were put into effect. One or two went out by wire, the rest by mail, because they were too long to put on the wire.

Most of the time the 4-payment plan announcements had been mixed up with the price announcements, in which case they went out simultaneously. With a very few exceptions we circulated, either by wire, air mail or regular mail, all announcements made by any refiner.

The Institute and its representatives took no part in influencing the action of the refiners on freight rates and im-

[fol. 982] portant terms except in the very early part of 1928 when the Institute did try very hard, by giving statistical information, to keep the refiners from breaking down to a differential rate in territories where, in fact, differential rate shipments were contemplated. Judge Ballou struggled with that in 1928 but invariably met with defeat. The rates were broken down in all instances.

M. E. Rionda has been secretary ever since the Institute started. He was also treasurer. We have a board of directors and at the present time it is composed of one person from each of the member refiners. We have an executive committee composed of 5 of the directors. Without exception these directors and the members of the Executive Committee are all officers of the member companies. We have a chairman of the board and a chairman of the Executive Committee and at times an honorary chairman of the board and honorary members.

The board of directors started to meet once a month. That was changed because the members had to come so far and for the last 2 years there has not been, except for the annual meeting, any specific date set for the directors' meeting. They met once a month until some time in the early part of 1930 and have met at more or less irregular [fol. 983] intervals since then. Twice the meeting of the board extended over from one day to another. The old Executive Committee met every now and then. The present one started meeting once a week. During periods in the summer when there was nothing for them to do, they did not meet for 3 or 4 weeks. We postponed a number of those meetings because there was no business to transact.

It would not be a violation of the Code for a refiner to sell sugar at a price that had not previously been announced to the Institute. A great deal of damaged sugar was sold that way.

There are instances where refiners have announced to the Institute that they will no longer announce their prices and terms. There were announcements to the world at large that they were going to sell at any price they desired. C. & H., National and Colonial have done so and, I believe, Godchaux. Other than C. & H., they merely sent us a letter saying that due to a general mix-up in the trade they would no longer announce their prices and terms but would meet competition as they found it.

Members under ordinary circumstances could not sell sugar at a price not previously reported to the Institute, without violating the Code.

Redirect examination.

By Mr. Peck:

Referring to my answer at page 5240 of the Record where I said members under ordinary circumstances could not sell sugar at a price not previously reported to the Institute without violating the Code, I understood the question to mean without making any announcement at all. If the refiner has openly announced a change in price and posted it on the bulletin board but not sent a wire to the Institute, that is perfectly all right. He does not have to sent it to the Institute. It would be a violation of the Code to sell at a price not openly announced but the fact he had not sent his wire to the Institute did not affect the situation.

The daily sales which I put on my charts were not regularly reported to the Institute but were specially collected in the first part of this year for this suit. The refiners did [fol. 984] not notify me of their daily sales.

Recross-examination.

By Mr. Fly:

I think there was only one instance where the members of the Institute were permitted concertedly to meet a certain competitive situation and that was the split-billing in El Paso. The discontinuance of split-billing in El Paso was in response to Ballou's Letter, which is Exhibited 420-E-2.

[fol. 985] CHARLES H. WHITE, JR., was called as a witness on behalf of the defendants.

Direct examination.

My Mr. Peck:

I am general sales manager of the American and have acted in that capacity since January 1, 1928. I am in charge

of sales. I have jurisdiction over the general sales department and the branch sales office operated by American. Our branch offices are located at Boston, New York, Philadelphia, Baltimore, New Orleans and Chicago. We have refineries at Boston, Brooklyn, Baltimore and New Orleans. I have been in the sugar business about 16 years and have been with American during all that time.

I have complete charge of handling and supervising the procedure of the price announcements for the company. We receive information from several sources about price changes. I am very familiar with American's and other refiners' methods of making price changes prior to 1928. Prior to 1928, when it was decided that a price change would be made, the general sales manager prepared a price announcement which was promptly posted on the bulletin board in the general sales department and the New York sales office. Brokers used it to keep posted. The outside sales offices as well as the New York sales office, which operated independently from the general sales department, were [fol. 986] advised immediately over the telephone of a change in price. These offices immediately communicated with the local brokers and a selected list of customers in the refinery city or branch offices and in the case of New York the sales manager of the New York division communicated with the general brokers in New York and a selected list of customers.

There are between 60 and 70 general brokers in New York. A general broker is one who has the privilege of offering sugar for all refiners.

The next step is to prepare and send telegrams to all American brokers, announcing the price change. That is done very quickly because the names are listed on the wire and all that is necessary is to write one copy of the wire and post it.

Exhibits Q-3 and R-3 contain announcements of the change of basis price and advance on March 27, 1926, and a decline on November 1, 1926 and are typical of the types of announcements that I have been talking about. They are typical of the wires sent to brokers and the wires sent to customers announcing changes in price. The same telegram is not sent to both, but the substance is the same.

Defendant's Exhibits Q-3 and R-3 were received in evidence.

[fol. 987] It was the practice to telephone certain of our competitors, including Federal, National, Arbuckle, Colonial's New York office, McCahan, Pennsylvania, Savannah and Warner. It was also the practice to notify several news agencies, including Willett & Gray, Associated Press, Journal of Commerce, New York News Bureau and Wall Street Journal. We tried to give price changes as wide publicity as possible so the information could get out to the trade. If it was an advance we wanted the trade to think about buying sugar. If it was a decline we wanted them to know about it.

Since the formation of the Institute in 1928 the method employed in announcing price changes has not been changed with the exception that after the announcements have been made a letter has been directed to the Institute announcing our change in price. I dictated that letter to a stenographer, signed it and usually sent it over by a boy. We still send our wires to our brokers and customers in the same manner. Exhibits S-3 and T-3, advising a change of basic price advance on August 28, 1930, and a decline September 25, 1930, are typical of what we sent out.

There were many occasions before 1928 when we gave very little time for buying because of market conditions and we made advances almost without notice.

[fol. 988] Defendants' Exhibits S-3 and T-3 were received in evidence.

We still announce our changes in journals, telephone our competitors after the announcement has been placed on the bulletin board and telephone our branch offices. Then it was my practice to dictate a notice and have it sent over to the Institute.

I have recently seen Exhibit 355-L but I have no recollection of ever having seen it before and do not know who prepared it.

The second paragraph states that when a change in price has been decided upon, a copy of the announcement must be furnished Judge Ballou before making announcement to our brokers and trade. That has never been done. I was in charge or preparing the announcement for the Institute for the first two or three months in 1928. The announcements which I had prepared were signed by one of the vice-presidents of the company but I handled the procedure.

They were never sent to the Institute before our announcement was made to the trade and to our brokers. There have been no instances, even in the early stages where I notified the Institute before our announcement went out to the trade. I have never considered notification of the Institute as a [fol. 989] condition precedent to a change in price.

The competitors whom I mentioned usually made a practice of reciprocating the courtesy we extended them by telephoning our office about price changes which they made. We often secured information about New York refiners very promptly from general brokers or their representatives who happened to be out in the street about the time the market change took place. We were also quite promptly advised by news agencies.

We received information about price changes from our Boston office, who in turn secured it from Revere's Boston office. As a general thing Revere telephoned there was a change in the market. Our brokers would pass it on to us by telephone. Information from McCahan was telephoned by our Philadelphia office and at times by the Pennsylvania office in New York and by McCahan's connection in New York and by brokers in New York who secured the information. Information came in to us by telephone from Savannah on occasions and was received also through Savannah's exclusive broker in New York, Lamborne & Company. Colonial's information came by telephone and from general brokers. Information about Godchaux and Hershey was telephoned to us by our New York office who secured it directly from competitors in New Orleans or their brokers. Information about Imperial and Texas City came to us from [fol. 990] our New Orleans office, which was advised by brokers located at Houston, Texas, and who telephoned it promptly. Information about C. & H. came from three sources, Daub & Carr, New York, our Chicago office and our St. Louis broker. Western's information came from the Meinrath Company and the Lowry Company in New York and from our Chicago office. Meinrath was very closely affiliated with Western.

There has been no change in securing information since the Institute except we receive the announcements from the Institute of the change in price of these competitors. Invariably we receive the information of a price change on the part of our competitors quite some time in advance of

receiving it from the Institute. As I recall there is only one case in which the information about the price change of a competitor came to us from the Institute first and that was in connection with the Texas refiners. There have been times when that information was delayed on account of being passed from our Texas brokers to our New Orleans office and then to us. We receive information from trade sources before we do from the Institute.

The bulk of sugar is sold on what are known as market moves. Some business is done between moves which is [fol. 991] usually termed spot business. Spot business is for immediate delivery to fill day-to-day requirements. On a move sugar is sold under contracts providing for delivery within 30 days. A refiner might today be quoting a price of 5.00 a hundred. He may announce at noon that effective at the close of the market tomorrow his price will advance to 5.10. The trade then has the privilege of buying at the 5.00 basis up to the close of the market on the next day. All sugars sold on the move would be sold at the 5.00 figure and entered on the 30-day contracts. There have been times when moves have extended over 2 days. If the price advanced and we went firm at the close today and a customer sends in a night letter which we do not get until the next morning, it is the practice to accept business submitted in wires sent before midnight on the day we are selling at the old price. On our records it shows up as of the day we were quoting the 5.10 price but a notation is made that it is overnight business. During the summer months Saturday has not been regarded as a business day and if there is an advance in price Friday and someone sent a telegram arriving Saturday morning the business would be accepted Monday morning at the old and lower price. There might be a day or more after our advance in price had been effective when we would be taking business at the [fol. 992] old price. However, in such cases it would be business submitted before.

After we announced a price advance buyers usually held off buying until they saw whether other refiners joined the advance. They know that if other refiners do not follow, the advance will not become effective. Buyers do not place their business until a sugar move is going to take place. If there is a decline in price for a day and an advance the next day a move would result. If we have a straight de-

cline instead of an advance we would not get a move because the trade can continue to buy sugar at the lower price and it is entirely possible the price may go lower.

Before 1928 the trade would know that the condition of the raw market or something in the trade warranted an advance. They would begin to buy refined sugar before an advance was made by the refiner. So, often times when a refiner announced an advance and coupled it with an announcement he was firm at the advance, the trade had already covered because they felt sure an advance would occur and had been advised by their brokers. They protected themselves before an actual advance was made. They did it more carefully before 1928 than after because formerly they were never sure when the refiners would [fol. 993] advance the price.

The system of booking sugar on moves is not any different since the Institute was organized than it was before. Moves did not come in with the Institute. They started with the sugar business.

In typical cases before the Institute there were instances where our price advances were announced effective immediately but they did not really mean what they implied. The refiner continued to take business at the old price for a limited time but reserved the right to announce an advance without notice. The trade immediately began buying sugar and many times they would buy at the old price. Although we announced we were advancing the price immediately, we did not really do that, but there was an indefinite period of grace in which buyers had an opportunity to purchase. Sometimes it was 2 hours, sometimes a day, sometimes 2 or 3 days. Often, buyers were late in getting in orders which were not accepted at the old price.

Since the Institute it has been the practice of refiners to announce they will be firm at the advanced price at a definite time. Usually it has been over a period of a day. The buyers know they will have sufficient time to place their orders at the old price before the advanced price becomes effective.

[fol. 994] It was the practice of our company and other refiners to announce a decline before 3:00 o'clock in the afternoon, effective at the opening of the next day's business. That, however, was changed in the latter part of 1928 when it became the practice to announce that the

decline, regardless of the time of day, was effective at the opening of the market of that immediate day, not the next. We changed because the trade, which had withdrawn sugar in good faith in the forepart of the morning, would pay a higher price than the customers who bought in the afternoon. Furthermore, if the market was weak, the trade would hold off placing their orders early in the day, anticipating a decline, and we would find ourselves without sufficient orders to take care of our production in the morning and be overstocked in the afternoon. To remedy this situation declines were made effective as of the opening of the market on the day on which they were made. Because of certain situations, there were times when declines were made retroactive for a period of several days.

I prepared the queries comprising Exhibit 385 and some numbers following but did not take them up with the Institute. They were prepared very shortly after the Institute was formed and our company became a member. I had just begun my job as sales manager and had been advised [fol. 995] that American intended to live up to the Institute's Code of Ethics to which it had subscribed. I was very anxious not to do anything that would be considered a violation of the Code and when situations such as these arose I wrote out these queries in order that I might secure some advice. As a matter of form I had inserted at the bottom, in order that I could keep the advice that was given to me with the queries, "Institute ruling", assuming that the officer of the company to whom I submitted these would probably confer with someone in the Institute regarding that particular query. I did not take them up with the Institute myself but submitted them all to Foster who was at that time president of the company.

The typewritten matter below "Institute ruling" was inserted after Foster advised me orally how we should proceed in interpreting the Code of Ethics. The handwriting on Exhibit 385 below "Institute ruling" is mine. I presented it to Foster in person and he gave me an answer immediately. If he handled it later with the Institute, I knew nothing about it.

We had a differential on coarse grain sugar and C. & H. did not. There was some movement on foot towards stand-
[fol. 996] ardization of various grades but nothing had been done at that time so we continued to offer our sugar with a

differential. Naturally we were not able to sell in this territory. At a later date, when these standardizations had not been acted upon, we announced we would sell that sugar at the basis price without a differential.

Page 2 of Exhibit 385-A deals with sugar on consignment with Edgar at Detroit. I asked Foster if American would pay storage and brokerage when the sugar was not applied against the contracts which existed prior to the Institute. He did not take the matter up with the Institute. He gave me this reply immediately upon my submitting the query to him. When I returned to my office I had the substance typed in. The expression "Institute ruling" is a misnomer and it did not occur to me to change it after the information was given to me by Foster. I put "Institute ruling" in before I received the information.

I spoke to Foster about freight rates to New Bern as shown in Exhibit 385-B. My recollection is that when this was submitted to Foster, he advised me that he would let me know later, which he did, but in advising me what we should do, he did not advise me whether he took it up with the Institute or not.

I took up with Foster the matter of cartage allowance referred to in Exhibit 385-C. He did not take it up with the Institute but told me what we would do while I was with [fol. 997] him and this was written in. When I presented this to him it had already been decided that we would make an allowance on cartage rates and so that automatically answered this query. Cartage allowance as announced by our company had been approved by Foster and we established it as a company policy.

I took up with Foster the matter of contracts for more than 30 days, referred to in Exhibit 385-D. He did not take up the matter with the Institute in my presence but gave me an immediate ruling and decided as a matter of company policy that we did not care to contract for sugar beyond 30 days.

I took up with Foster discounts to people who were bidding on Government business, referred to in Exhibit 385-F. I do not know whether he took it up with the Institute. This reply was not given to me immediately but later.

I took up with Foster the matter of 200 bags of damaged sugar referred to in Exhibit 385-C and asked if I should quote it below the market. I do not know whether he took

it up with the Institute or not. I was not advised immediately. What I put there was given me by Foster. We did not, as stated in the clause "Before offering this sugar we will advise the Institute of the amount to be resold and [fol. 998] the name of the market," advise the Institute before offering the sugar. We advised the Institute as a matter of information that damaged sugar was offered. I have no recollection of ever advising or being instructed to advise the Institute before damaged sugar was sold. I sent notices to the Institute about damaged sugar and all authorized sales were made from the general office. After the transaction has taken place we get all the details as to the damaged or frozen stock, price, customers and destinations, and we furnish that information to the Institute. We have never taken up with the Institute the question of whether or not we were going to authorize the sale of damaged sugar before deciding to do so.

I took up with Foster an inquiry regarding returnable bags of the Freihofer Baking Company, referred to in Exhibit 385-H. He did not take it up with the Institute but gave me the answer when I presented the query to him. It was that we should not pack sugar in returnable bags.

I took up with Foster the question of an allowance for empty bags returned by customers, referred to in Exhibit 385-I. He did not take it up with the Institute but answered me immediately. I do not know who prepared Exhibit [fol. 999] 385-J. It was not anything I took up with the Institute or with Foster. I have no recollection of preparing or ever seeing Exhibit 385-K.

I had no such conversation with O'Reilly about purchasing sugar f. o. b. New York as he testified on pages 1105 and 1106. He was in my office and discussed the operation of the Institute. He attempted to explain to me the difficulty he was having on account of not being able to get concessions. I recall asking why he was not giving American more business and stating to him that we were in a position to serve him and would like very much to have some additional business from him. He stated that under existing conditions he was not able to give us any appreciable amount of business. He did not ask me if we would ship him f. o. b.

We had refused to ship f. o. b. during the time when, according to our open announcement, we were not accepting business for shipment f. o. b. O'Reilly did not, during that

period, ask us to ship f. o. b. I do not recall that he ever asked us to ship f. o. b. There were no shipments f. o. b. to him prior to the period I am speaking about. He always bought either for shipment out of New Orleans or from transit stocks on our regular prepaid selling basis.

[fol. 1000] Cross-examination.

By Mr. Fly:

In testifying that American never asked permission or gave prior notice to the Institute as to making proposed sales of sugar, I did not limit that entirely to damaged sugar, but sugar in general. My answer is entirely consistent with a letter in Exhibit 430-M. This is not a question of a sale of sugar at a price. It is a question of effecting delivery of sugar which would be equivalent to delivering from consigned stock at a point which we had announced was not a consignment point. The sugar was on hand just as if it had been under consignment because delivery had been refused.

Before saying Exhibit 430-Q is inconsistent with my answer I would have to see the advice from the company or the instructions given to the broker. I have no recollection of giving any broker any such instructions. His statement is contrary to mine.

We did not always get notices to the Institute prior to 3:00 o'clock in the afternoon on the day preceding the effective date of the change. It depended upon the time the company decided to make an announcement or upon the time when competitors made announcements. We have made it as late as 5:00 o'clock. I am referring only to instances where the change was not originated by American. [fol. 1001] In the main it would be at times when we had made a price change that had already been announced.

It was the general practice for the refiner who originated a price change to get out his notice to the Institute prior to 3:00 o'clock in the afternoon the day before the effective date of the change, in order that wide publicity might be given to the announcement through the afternoon and morning papers and brokers' circulars which had to be prepared in the early afternoon in order to get out the same night.

In the early part of January, 1928, I was new in my job as general sales manager. It was also the time of the or-

ganization of the Institute. I made a number of inquiries designed to bring my practice within the rulings of the Code Interpretations as made by our executive committee. On January 12, 1928, I had the first inquiry, Exhibit 385, typed and took it to Foster. Afterwards I inserted the answer that he gave me. The part inserted later is in my handwriting. The ones I prepared and presented were in the same form as the first. The questions were coming up and I was particularly anxious to do nothing that could be construed as a violation of the Code and I took the precaution of making a record of any information given to me on these matters.

[fol. 1002] I adopted that form myself in the beginning and preserved each one right along over the period that they were used. During the time that they were in use, these documents were kept in a folder in my desk. Later they went into the general files but during that period I kept this folder on my desk so that when these matters came up, and I did not recall just what advice had been given by Foster, I or anyone else in my department could refer to them.

Foster was president of American in 1928.

Mr. Fly: He was also a member of the board of directors and of the Executive Committee of the Institute in January 1928.

Defendants' Exhibits U-3 to W-3, inclusive, were received in evidence.

Redirect examination.

By Mr. Peck:

Exhibit X-3 was submitted by me to Foster. The sales department was asking for instruction from him and not from the Institute.

Defendants' Exhibit X-3 was received in evidence.

[fol. 1003] MARTIN E. GOETZINGER was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am chief executive of Arbuckle Brothers which is a partnership. I have been with Arbuckle for 30 years and

have been chief executive for 4 years. Prior to that time I was assistant to the managing partner, William A. Jamison.

Primarily I determine the prices and price changes. I take into consideration numerous factors. The same factors are very seldom present at the same time or are seldom of the same relative importance. A refiner starts with a multiple ambition of selling as much sugar as possible at a profit.

The factors which are subject to demonstration with pencil and paper are the obvious ones, namely, the cost of the raw material, of manufacturing, of selling and of delivering. There are several factors which are not subject to demonstration on paper.

The profit per unit in the sugar refining business is so infinitesimal that a refiner must keep his refinery busy 24 hours a day in order to make a profit at all. It frequently happens that he will accumulate stock so that he must do something to get rid of it. This is a very important factor [fol. 1004] upon which he must use his judgment. If he has no place to store his accumulated sugar he must of necessity move it at once.

We must also deal with orders which are on our books especially if the customers have not taken delivery. Furthermore, we have to consider the season of the year. In the summer orders may be expected to come in in a large volume. However, a cold spell will hold back the usual number of orders that we might expect and we have had to beg customers to order out their sugar.

There is also the question of what might be called buyer's psychology. Buyers sometimes hold back for a long time and at other times they will rush into the market and buy. All these are real factors and we must weigh them, but I have never discovered a rule by which they can be given any relative w ight.

If we have a lot of refined sugar on hand we consider various ways to use it. If we reduce the price and it does not move, there are various other means. An announcement of a lower price for one day with notice of an advance to the old price the next day has often been successful. A price advance is successful if competitors follow. What I suspect my competitors are doing has a great deal to do with the price I put on sugar. You never know what they are going to do.

[fol. 1005] If my competitors announce a decline I follow as soon as I get the news. That is the only way you can sell sugar. I never stop to think whether I can afford to sell at the lower price.

The period which has elapsed since the last buying move is important. Sales have been made on 30-day contracts and the customers, having been requested to take out their sugar within the time, look for another move at the end of the period because they are ready to place orders again. The 30-day contract is something that has been in the trade for a great many years. It is a chronological unit, just as a carload is a unit of purchase.

When I am thinking about making a price change I do not talk with my competitors. I have no understanding whatever with them. I have never consulted any of my competitors before I have changed our price. I never have indicated to them what I intended to do about our price. None of them ever advised me what they proposed to do. None of my competitors ever endeavored to influence me in connection with my price changes. None of them have ever tried to dissuade me in any manner from announcing a price decline. None of them ever asked or suggested to me that I advance my price. I have not suggested to them [fol. 1006] that they advance their price. I have never suggested to them that they should not decline their price.

The Institute has never endeavored to influence me in price changes. Taylor has never called me or got in touch with me or suggested that I do anything, either up or down, in the way of prices or of maintaining prices, nor have Messrs. Patterson, Fisher or Judge Ballou. None of my competitors told me I ought to do something and asked me to follow them. No one ever told me that they were going to do anything and asked that I follow. They never told me what they were going to do.

The price changes of Arbuckle were determined by my judgment without communication or understanding of any kind with any of my competitors. The only ones I consult are an executive or two in our own establishment. I never go outside of our office for that.

Arbuckle announces price changes openly. It has been our policy for 34 years, ever since we have been in the sugar business. A notice is written out and a great number of copies are made. One is posted on the bulletin board

in our office. Since the formation of the Institute one copy is sent to it, a copy is sent to the ticker agency and one or two to other news agencies. The Journal of Commerce gets one and if any brokers are about they can help themselves. [fol. 1007]

There is no difference in our practice since the Institute except the sending of one copy to the Institute.

We are anxious to give wide publicity to our announcements.

The announcement to the Institute is sent over almost immediately after it is put on the bulletin board and at the time we send it to the others. I have never notified the Institute before I put it on the bulletin board or before I notified the trade.

I received information of my competitors' price changes as promptly as possible. This is nothing new since the Institute. We received price change information of our competitors before that. The first information comes from the brokers who are in the office or those who call us up and tell us someone has advanced or declined his price. We get it from the Institute in the same way and it also sends us a copy. We know of changes before we hear from the Institute.

The first price change that Arbuckle led after the formation of the Institute was on February 24, 1928. The preceding price change had been on February 17 when [fol. 1008] American declined from 5.70 to 5.60. On February 24 we bought raws at 4.24. On the 29th they advanced to 4.40, indicating an advance in the market. There had been no real movement in that year at all. On the 23rd we had on hand 75,000 barrels of refined sugar and sales against that of only 7,500 barrels. A situation was presented where an advance was indicated. Accordingly, we announced an advance to 5.65 effective on February 24. The move was fairly successful. It was not followed immediately by the others so there was a little drag there.

On April 2 Godchaux advanced to 6.00 from 5.85. It happened that on March 26 and again on April 2 we had bought raws at 4.58. It did not look to us as if an advance to 6.00 was fully justified. It looked as if that was going a little bit too high so we advanced to only 5.95 and our

judgment seems to have been justified because raws dropped almost immediately to 4.36.

On May 23 we advanced from 5.95 to 6.00. The other refiners had been selling at 6.10. That produced quite a move. The move on May 23 was brought about in this way—we advanced to 6.00 with notice that on the 25th we would go to 6.05. We sold the bulk of our sugar at [fol. 1009] 6.00, which was the average price. At practically the same time the other refiners went from 6.00 to 6.10.

The decline from 6.00 to 5.80 was for one day only. That was one of the old Arbuckle specialties—of having a special sale now and then at a bargain to pick up a little business when we felt we needed it. I believe that was partly justified by the price of raws which had dropped from 4.46 to 4.27.

Our sales of refined sugars for the first 25 days of June had been only 13,200 barrels. The market was dead. We had on hand a stock of 60,000 barrels, and thought it was time for a little bargain day, but the other refiners met us. A decline from 6.00 to 5.80 for one day only, in practice, is going to 5.80 for the 26th and then on the 27th we would go back to 6.00 unless, as it sometimes happens, we go down for one day and announce on the following day we will go to some different figure which may be higher or lower than the one we started from. In this instance we went to 5.80 for one day but did not go back to 6.00. On June 28 the Pennsylvania announced an advance to 5.90. I do not recall that all refiners then went down to 5.80.

[fol. 1010] Because the Pennsylvania established the price for all of us by advancing only to 5.90, we did not go back to 6.00 but only to 5.90. We intended to go back to 6.00 but I could not sell sugar at 6.00 when the Pennsylvania was offering just as good or almost as good sugar at 5.90. We used to try to believe that Arbuckle sugar was superior to others but you cannot put that across. Sugar is all alike.

The effect of these price changes was to precipitate a move at 5.80. On August 1 we announced a decline from 5.60 to 5.40 effective at the opening of business on August 2 for that day only. That was again a situation where we had had an era of very poor business. July sales had been only 23,200 barrels. We had on hand a stock of 86,000 bar-

rels and we had orders for only 6,700 barrels. The result of that condition of the market was that Pennsylvania met the decline but they did not meet it for one day only and the movement went on at the price we had fixed, 5.45, but we went on with our notice, at that time advancing to 5.55. We did not go back to 5.60. I account for the small booking we had at that time to poor business. A period of over 30 days had elapsed since the last buying move, which had been on June 28.

On September 14 we announced a decline from 5.65 to [fol. 1011] 5.40 effective at the opening of business September 17. That was a market condition pure and simple. The raw market was weak. On the date of this change, September 17, we had bought raws at 4.02 which was down 12 points from our preceding purchase. A day or two later we bought at 3.85, still further down. Business had been poor in the early part of September. It was rather apparent that this was one of those times when the buyer of sugar was outguessing the refiner and would buy only when the price was not too high.

On October 9 we announced a decline for one day from 5.40 to 5.20 effective October 10. Our competitors would not let us have a bargain day. They all followed us and did not place any limit on the time. They reduced their price to 5.20 and there again we felt the need of doing something to stimulate sales. From September 1 to October 1 our sales had been only 14,800 barrels with only 2 or 3 days of good business and we had on hand a stock of 72,000 barrels and orders for only 8,200. We made an announcement the next day of an advance from 5.20 to 5.25 effective on the 11th. A small move took place. It was pretty good for October because the season was rather well advanced. It was not our intention to go down to 5.20 and then back to 5.40 because [fol. 1012] we had announced we would go back to 5.25. On October 9 when we announced a decline to 5.20 for one day only effective October 10, we really did not have "intentions". We may have had hopes to go back to 5.40 but the next day I changed my mind and made it 5.25—up 5 points. Raws had stiffened up a little, to justify an extra nickel charge. On October 29 it went down from 5.25 to 5.10 effective October 30. That was partly due to weakness in raws. The day on which that move was effective we bought raws at 3.83 and the next day at 3.77. Our stock on that day

was 97,500 barrels, a pretty big stock. The sales for the first 29 days of October had been very, very poor. On November 27 we announced a decline from 5.20 to 5.15 and on November 28 an advance effective November 29 to 5.25. That was another bargain day. There was no real underlying reason for that except to stir up a little sales effort at the end of the year. It was getting pretty close to the end of the year and any sales we could make put us just that much ahead.

The decline on January 3, 1929, from 5.25 to 5.15 effective at the opening January 4 was an instance where the refiner was almost forced to do something of the kind. December had been a very poor month. Our total sales had been only 6,500 barrels. We opened the year with a stock of 70,000 [fol. 1013] barrels and only 1,600 barrels ordered against it and on that date we bought raws at 3.77, a decline of .12, and again there was no use of trying to get a higher price for sugar that we had made from higher priced raws. We sold it for what we thought we could get for it.

The decline on January 10 from 5.15 to 5.05 followed a sort of mix up. American had advanced to 5.20 on January 8. C. & H. announced 5.00 for one day only, a drop of 20 points. C. & H. followed American's advance by declining for that day and then advancing to 5.15 on the 10th. Following that American withdrew its advance and then as I recall it there was quite a little jockeying between the various refiners. Raws had declined and possibly to do a little business we declined to 5.05. We intended the decline of January 17 to be a bargain day but again the Pennsylvania met it without limiting it to one day.

On January 16 we announced a decline to take effect on January 17 and on January 17 announced an advance to take effect at the opening of January 18. The purpose of that price change was to sell sugar. It resulted in a move but not a very large one.

On September 4 we announced a decline from 5.50 to 5.30 and an advance to 5.35 on September 6. National fol- [fol. 1014] lowed the decline but did not advance to 5.35 so that the price became 5.30 for all refiners and Arbuckle did not stay at 5.35 but went back to 5.30. The decision of other refiners led the trade to believe there was no strength in the market and if they did, they were correct. On September 4 we had bought raws at 3.89 which is 10 points

below our preceding purchase. On September 24 we advanced to 5.50. There had been an intermediate advance from 5.30 to 5.40 on September 11 on the announcement of American. Raws had taken a jump on the day preceding American's advance to 5.40. They had bought raws at 4.02, which was up 13 points. Then following that advance of American to 5.40 we advanced to 5.50, the price of raw sugar in the meantime having gone to 4.08.

On December 16 Godchaux announced an advance from 5.00 to 5.20 effective at the opening December 17. That was followed by several refiners but we only went to 5.15 with 5.10 for prompt advance. The month of December is a poor time to try to start an advance in the price of refined sugar. We had bought raws however on the 16th at 3.86 which justified an advance, but in our estimation at that season of the year it was not the right thing to do to go to 5.20. If we were going to encourage the trade to buy, we had to make it attractive for them to buy at the end of [fol. 1015] the year. The trade does not like to buy then because it goes into their inventory at the beginning of the next year. It has never been our policy to encourage the trade to buy heavily at the end of the year. The refiners other than Godchaux followed us. Pennsylvania advanced to 5.20 on the first notice for about 2 days but went back about a week later.

On February 10, 1930, we declined from 5.00 to 4.95 retroactive to the opening of business February 3. The year opened with Pennsylvania's announcing a sort of bargain day price at 5.10 advancing on the 8th to 5.20. That price was followed by all. I was away at the time. I spent my holidays in California and on returning went into the price changes that had taken place, the market condition for raws and what the price of refined was and it did not seem to me that the advance had been justified by the conditions. I told our people at the office that I did not think it would stick. I observed brokers' statements indicating that as many as 6 or 7 announcements had gone out in one day. The dissatisfaction spread to New York. We had all sorts of complaints from buyers who told us that a repricing movement would have been put into effect if Arbuckle were not standing in the way, because we strictly observed all our rules and regulations. That angered us. I made up my mind if anybody was going to reprice I

[fol. 1016] would show them how. I made the 4.95 price retroactive to the day C. & H. made it 4.95. Almost immediately after our announcement they said they would make it retroactive to January 6. Everybody followed and lost a lot of money.

The contracts which had been effected on January 6 for 5.10 were all billed at 4.95, whether they had paid the bill in the meantime or had the sugar or not.

The cost of raw is about 75% of the cost of the refined and is by all odds the most important factor. The other 25% varies in proportion to the variations of the raw.

The refiner must buy 107 pounds of raw with which to make 100 pounds of refined. The amount of the 7-pound refining loss varies with the cost of raw sugar. A refiner's cost is instantly changed by his output. If he is running 24 hours a day, the costs are down to a minimum. If he has to shut down 2, 3, 4 or 5 times during the season his cost goes up materially.

On August 6, 1930 we announced a decline from 4.60 to 4.50 on the opening of the 7th and an advance to 4.60 at the opening of the 8th. National met our 4.50 price but did not announce a return to the old price, hence 4.50 became permanent. We could not return to 4.60 as announced because we could not sell any sugar at that figure; 4.50 became the price of all refiners, including ourselves. We [fol. 1017] reduced the price and raised it right away because it was one of our bargain days. July had been an exceedingly dull month. It seems almost impossible, but our sales for the entire month were only 26,000 bags. We had in stock 226,000 bags and had orders against it of 21,000.

On August 19 we declined the price from 4.50 to 4.40, effective August 20. That was a market move. We bought the raws on the preceding day at 3.18, a slight decrease.

On November 14 we advanced from 4.65 to 4.75, effective at the opening of the 17th. That was a sort of an end-of-the-season tonic to the trade, to get in a little more business. We wanted a little more business and National in the meantime or preceding that time had announced 4.65.

On the 16th we made our announcement but on November 14 we had a little edge on the business over other refiners by a difference in price of 10 points.

On October 24 Godchaux advanced to 4.65. On October

25 C. & H. advanced to 4.75. There again we felt it was a bad time of the year to advance and we remained at 4.65. We had bought raws on October 23 at 3.40, 3.45 and 3.47. The raw market was going up but we were letting our customers have a little benefit of the lower raw price we [fol. 1018] had paid. On November 14 we were 4.65. All the other refiners were 4.75. Having announced a bargain day for one day, we would probably have picked up quite a little business on a little advance of our own. We were not advancing to the general price. The National would not let us have it.

They advanced on November 16 to 4.75 from 4.65. The next day they introduced a bargain day of their own to checkmate that. My recollection is that all refiners followed. The move took place at 4.65 and it was not an exclusive Arbuckle move.

Arbuckle has always sold their sugar at open prices. We did not indulge in concessions before the Institute. They were unknown in our office. We do not make allowances for used bags.

With 1 or 2 exceptions, we did not store in customers' warehouses. It has always been difficult for me to view as our agent a warehouseman who was always buying against us and selling his own goods against us. I do not see how a man can serve 2 masters at the same time when one selfish interest does not permit him to be fair.

We did not pay brokerage to customers at any time except to a large sugar dealer in Detroit who was also a broker and warehouseman. All the refiners stored in his warehouse and paid him a brokerage. He had one name for his selling organization, another for his brokerage or- [fol. 1019] ganization, another for his warehouse organization, but they were all owned by the same man or same family, a man and his mother.

Prior to the Institute our list price was our selling price which occasionally was below that of other refiners. From my information of the sugar trade I should say they had to meet our price or they could not have sold to the trade generally.

Before the Institute we had bargain days which the other refiners did not have.

Everyone knew from various sources of information that refiners were selling sugar at a given price. One refiner cannot get more for his product than another refiner.

The selling basis of other refiners, less their secret allowances brought their price below our bargain day price.

Customers who did not receive special concessions and who were unable to buy our sugar paid a little more than our bargain-day price.

Our list price was generally below the list price of other refiners but our list price was met by their selling base.

We did not know how general the selling base of the other refiners was, but we thought it was very general.

[fol. 1020] The other refiners did not generally meet our bargain day price which would not have been successful if every purchaser knew he could buy as cheaply. But generally they were successful and we were able to move a lot of sugar.

Since the Institute our bargain days have not been successful. The reason is that secret allowances were pretty general before the Institute and if at that time the other refiners publicly met our price, these secret allowances would have carried the price still lower.

Since the Institute, Arbuckle has endeavored to get its price below that of other refiners as I have shown and with but one exception for a short period in 1928, the other refiners have met us instantly.

For three or four years prior to the Institute Arbuckle did not maintain any consignment points. We changed our policy because we felt that competition required it and now maintain a few. Arbuckle is opposed to price guaranties. Five or six years prior to the Institute we did not guarantee at all, but we do so now in a limited territory around Chicago. We are trying to sell sugar there but cannot do so without a price guaranty.

It would be very hard to say how the operations of the Institute have affected the conduct of Arbuckle's business. [fol. 1021] Our practice and policy are about the same as they have always been. At the time the Institute was formed I attended the meetings as an observer in order to post my chief, Jamison, when he returned from Europe. I became very much impressed by the earnestness of the 18 or 20 men who devoted every hour of every day in the week to a discussion of the means to better conditions in the sugar industry and by what Cummings told us of his reception in Washington. We knew the Department of Commerce was encouraging all industries to form institutes to try to cure their troubles instead of running to Washington with them.

I considered the Code of Ethics carefully and I was present when most of the provisions were discussed. I recommended to Jamison that we try to help the good work along. He gave his assent and after the Institute was started we were enrolled as a member. During the latter part of 1927, competition had become so fierce and conditions so disturbing, that no man knew where he was. Refiners' price lists meant nothing at all. Arbuckle, C. & H., Revere and one or two other exceptions like them were not giving concessions, but everything was going on. We were getting letters from customers saying that such and such a refiner was sending them two or three carloads of sugar and charging the usual price, notifying them to help themselves to the sugar, and [fol. 1022] that they would be billed for it later. We could not, under our policy of open announcements of prices, possibly have followed their procedure. A strong hope was engendered at these meetings that all of these practices were going to be abolished.

We have been in the coffee business since 1859 and in the sugar business since 1898 and have always been an open one-price house to everybody, treating all our customers alike. We despised these concessions because we did not think they were fair.

At the organization meetings in December, 1927, at which I was present as an observer, there was a discussion of a provision requiring members to report to the Institute such statistical information as the Institute or its Statistical Committee might require. I stated that we would not agree in advance to give anybody all the information they asked for concerning our business, explaining that we did not publish any statements to anyone. It was stated that no provision would be binding upon a member unless he consented to it.

We have not signed any paper to the effect that we would abide by the resolutions and recommendation of the Institute. I have never stated to any of the officers or staff of the Institute that we would abide by or be bound by its resolutions or recommendations. The question of the extent of the binding force of the resolutions was sometimes dis- [fol. 1023] cussed in open meeting, but I made no comment on it at all. I do not recall stating to any member refiners that we would abide by or be bound by the resolutions or recommendations of the Institute. I never told them that I would not be bound by them. No member ever suggested

that anything we were doing was not in accord with the Institute and that we should stop it. Our company never took any action which any of our executives disapproved of as a matter of company policy because of any rule or recommendation of the Institute. All our actions have been taken in the exercise of our own judgment as a matter of company policy.

Cross examination.

By Mr. Rice:

Before the formation of the Institute Arbuckle always sold sugar at his list price. He never gave any concessions through storage or other devices.

I cannot tell what I thought the Institute was going to accomplish for Arbuckle. We hoped that the Institute would rectify some of the competitive practices which were going on. We called them competitive but they were practices which we could not ourselves adopt. We proposed to eliminate some of the irregularities, secret concessions and things we were ashamed to adopt as our own. We thought the [fol. 1024] whole atmosphere would be cleared and that we would profit thereby. That is all we are in business for.

I intended to give the impression on direct examination that Arbuckle was not obligated to follow the rulings and recommendations of the Institute. Cody is in charge of our shippers' sales office. He had no participation on behalf of Arbuckle directly but for a period of a year and a half was a director of the Institute when they increased their number from 15 to 30 in order to relieve the executives of a lot of details.

Cody has no authority to speak for our company although I would not say he had never undertaken to speak for us. He is a very liberal letter-writer. He has nothing to do with fixing prices or terms or telling people whether we obligated ourselves to the Institute or not.

The statements made by him in Exhibit 408-I are not correct.

If the Institute adopted a resolution and I was present and voted for it or, having heard it had been adopted in my absence, did not dissent from it, I observed it.

I do not recall having given notice of dissenting from any [fol. 1025] of the resolutions adopted by the Institute. Usu-

ally the resolutions, if they had been passed, were passed by unanimous vote and I must have voted for them and adopted them as my own. When I voted for the resolutions I hoped that the other members who voted for them would follow them. I did expect anyone who voted for a resolution at a meeting to abide by it. I considered my obligation under the code to be a very limited one. I have given very little attention to the binding force upon me of the resolutions of the Institute, but having attended nearly all the meetings and having voted in favor of all the resolutions that became effective, obviously I adopted them as my own and it never occurred to me to question whether I was bound by them or not.

I was aware that Cody was chairman of the Enforcement Committee of the Institute.

Petitioner's Exhibit 461 was received in evidence.

One of the purposes for which the Institute was organized was to limit the number of consignment points. In 1927 the existence of consignment points in almost every market where sugar was being sold caused an enormous waste of money.

Petitioner's Exhibit 462 was received in evidence.

[fol. 1026] Personally, I was not cooperating very actively with the Institute on consignment points. I will assume responsibility for what Cody did but not for Exhibit 457-Z-2, a letter in which he did not state a fact.

I never discussed the matter of price fixing at the meetings of the Institute and none of the other members did within my hearing. I never had any knowledge of such discussions or suspicions of them.

Freight applications were not discussed at Institute meetings although I understand they were topics of considerable discussion among the freight managers.

The charts in Exhibit O-3 do not show that the price of refined does not decline for at least 30 days after a move even though there has been a decline in raw.

Mr. Higgins: We admit that not only Exhibit 457-C but scores of other letters relate to the policy of Ballou attempting to prevent a break-down of the freight applications in markets where there were differential routes available, to a price where transportation was sold at less than

cost. This was kept up for several months and we will admit this letter and dozen of others relate to it.

Redirect examination.

By Mr. Peck:

The answer which I gave on cross-examination about my obligation under the resolutions and recommendations of the Institute meant that if I voted for a resolution I intended to follow it. I never had any doubt that if at some later [fol. 1027] time I changed my mind as to my desire to follow it that I could do so. After having voted for a resolution or recommendation, I did not consider that I might thereafter do something contrary to that resolution or recommendation without saying anything about it. I expected to tell my associate members that I would no longer follow what I had voted for.

The Institute discussions about changes of terms referred to an interpretation of the discount period to be allowed on water and rail shipments. They were all interpretations of terms rather than the making of terms. We never made a term. There were no discussions at the Institute meetings of the terms which we should adopt. No one at the Institute suggested what Arbuckle's terms should be or anybody else's. We did not consult our competitors about them or when we proposed to change them nor did we consult with the Institute or anybody at the Institute about them.

The decline of price in its relation to the 30-day period was not due to any understanding or agreement of the refiners at the Institute or anywhere. It is something that has been in force for a long time. We endeavored not to drop our prices for a period of 30 days. If I should sell a great many people a quantity of sugar today and, shortly [fol. 1028] thereafter but before it is taken out and sold, drop the price, I would lose a lot of customers. The feeling in the trade has a great bearing on the matter of reducing prices.

Years ago, before the Institute, we were selling in guaranty territory and every time the price dropped we would hear somebody complain and say it was not fair; that we ought to reprice because they were stuck. The customers requested us to reprice, particularly in the guaranty terri-

tory. When we were selling our sugar in guaranty territory we did not always guarantee ourselves.

I had no understanding with any of our competitors about not dropping prices in the 30-day period. I never discussed that at Institute meetings. There have been committees appointed to deal with the question of enforcing 30-day contracts. Members of the Institute agreed to sell sugar only at an open price and term publicly announced. Some action was taken to get refiners to enforce their contracts and require buyers to live up to them and take out their sugar in 30 days. It did not affect the price.

The purpose of obtaining information as to price changes, as far as the Institute is concerned, is accuracy. Where the change is a decline of 5 points or an increase of 10 points or something of that sort, the announcement is simple. You can get it over the telephone or take the broker's [fol. 1029] word for it, but if there is any condition attached to it, an explanation or qualification, you do not get it straight over the telephone or from the broker. Sometimes a broker gives his own interpretation of what the announcement is and an exact copy of the competitor's announcement is of value.

Recross-examination.

By Mr. Rice:

At one time there was up for discussion the question of making contracts which permitted buyers to take delivery beyond 30 days. On the Pacific Coast there was a common practice for a great many years to sell to fruit packers for longer than 30 days. The Pacific Coast refiners sell their ordinary trade at a shorter than 30-day period but sell to the fruit packers for a longer one. The question was whether the manufacturing trade in this part of the country could be given a better service by doing something similar for them. We wondered if a plan could be worked out, satisfactory to the manufacturing trade, to sell them on a 90-day contract at an increase in price a little bit during the second month and a little more during the third month. No action was taken but the discussion took place.

There was some discussion about reducing the contracts [fol. 1030] to 20 days. The question of adopting a uniform contract arose several times. No action would have re-

sulted unless it was concerted and that is why it did not result in anything. It is true of most of the other practices of the Institute that unless there was unanimous consent the action necessarily failed.

[fol. 1031] HENRY E. WORCESTER was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am vice-president in charge of the business of Revere Sugar Refinery of Boston, Massachusetts, and have occupied that position for the last 12 years. I have been connected with Revere for about 24 years.

I determine the price policy of our company. The price which we announce is governed by the price of raw sugar, the amount of raw sugar stock we have on hand, the number of contracts we have on hand, the knowledge we have of the same conditions existing with our competitors, whether our competitors have been heavy buyers of raw sugar and what we think the trade will use. The price which our competitors put on their product has everything to do with our price.

Sugar is an absolutely standard product. We know that we cannot sell our sugar for more than our competitors are actually getting for the same thing. We know that we cannot let them sell their sugar at a lower price than we do and obtain the necessary amount of business.

If any refiner with whom I compete declines his price, I immediately decline mine. I have to do it in order to keep my trade. If a competitor in Texas decreases his [fol. 1032] price it would not affect me until it affected somebody nearer to my competitive area, but as soon as it reaches my competitive area I have to meet it. If a Texas refiner declines his price the practical result is that it hits me almost immediately, but I would not necessarily feel that I would have to meet a quotation of a Texas refiner because we do not sell to the same customers.

Prior to the Institute the selling prices of the refiners were the same, to an equal extent that they are at the present time. Their listed quotations were not always the same

because they sometimes sold sugar at different prices from their lists. Before the Institute I knew the selling basis of my competitors. I had to.

Information concerning our competitors' price changes reaches me before the Institute's information. Prior to the Institute I received the information in the same way I do now, from customers, brokers, trade journals and the various services for which we subscribe. We generally receive the announcements from the Institute after we have had several reports from outsiders and the trade.

We announce our price changes by sending out telegrams to all our customers outside of our immediate local area. We notify local customers by telephone. We send a notice to the Boston News Bureau, to all the brokers with whom [fol. 1033] we do business and spread it as widely and as quickly as we possibly can. Our practice before the Institute was exactly the same. We send a copy of our announcement to the Institute. We have a list of customers all made out with a space at the top in which to write our telegraphic announcement. We send it to the Western Union and Postal Telegraph companies and they are supposed to send it out in the order in which the names appear on the list. I believe the Institute's name is at the bottom of the list.

Revere's price changes have been determined by me in consultation with my associates. We never consult our competitors. We do not want them to know about it generally because it may be that if we are anxious to be the first to make an advance or decline we should like to get it off before anybody else knows about it. We have never told any of our competitors what we intended to do about prices before we did it. None of them have ever told us what they intended to do about prices. I have never told anybody connected with the Institute what I intended to do. I have never discussed it. I have never had any conversation with any of my competitors to the effect that if one leads I will follow or if I lead someone else will follow. None of my [fol. 1034] competitors talked to me about what should be done in connection with prices or suggested that I should raise my price at any time. They have never suggested that I should not lower it nor that the present price should be maintained. Nobody from the Institute suggested to me what should be done with prices, neither Taylor, Patterson, Fisher nor Judge Ballou, while he was alive.

On March 4, 1930, Revere led a price decline from 4.95 to 4.85 effective at the opening of business on that day. At the time of that particular decline the raw market had been declining quite rapidly for a short time previously. There had not been an upward movement in refined for quite a long time and we were anxious to get some orders on our books. Our reason for that decline was that we hoped if we declined .10 it would stop there but someone else came along and declined still further and we had to follow.

On May 21, 1930, we declined from 4.80 to 4.70 because the same reasons prevailed at that time. A long period had passed without a movement in sugar and we were out of orders. A decline did not give us a quantity of orders but the movement of the raw market for some time prior to that had absolutely precluded advancing our price from that point because one simply knew the trade would not [fol. 1035] come in with the raw market going the opposite way so that before one could announce an advance and obtain a lot of orders he had to decline his price to somewhere near a price in accord with the raw sugar market.

On June 6 we announced an advance from 4.50 to 4.60 effective at the opening of June 9th although there was an intervening decline by Imperial of 20 points. We thought we saw an opportunity to get some orders on our books. We got a move.

The only time there is a movement in sugar is on an advance. We are probably influenced by the increase in the raw market which would make the trade willing to buy. The move was not followed. We did not sell the sugar we expected and had to withdraw our advance.

On October 14 we announced an advance from 4.45 to 4.55 effective at the opening of business October 16 because there had been a very sharp advance in raw sugar and as usual we had sugar to sell.

On July 20, 1931, Revere announced an advance from 4.65 to 4.75 effective July 22. There had been an increase in the raw price and I wanted to sell sugar. Customers' orders on our books were getting fewer in number. There was a move at that time.

Revere has always sold its sugar exclusively on open [fol. 1036] prices. It has always been our policy which we started 50 years ago and has not changed since the Institute. We have always sold sugar on openly announced

prices and terms to every customer and did not give concessions.

We never store sugar in customers' warehouses. A good many years ago we stored in a broker's warehouse. It cost us a great deal of money so we discontinued the practice. That is the only time when we stored with brokers knowingly. Customers have asked us to store with them but we do not think it is good business because we lose control of our own sugar. We have not paid brokerage for customers.

Revere's policies have not changed in any respect since the Institute. When the question of joining was first brought up and the Code of Ethics first considered, Revere felt that the proposed code was in harmony with its idea of the way business should be done and was perfectly willing to become a member of a body whose affairs were conducted along those lines. If the ideas of the Institute had been along different lines I am very doubtful whether we would have wanted to belong. We have every reason to believe that prior to the Institute our competitors gave concessions. I always felt that if I had to meet anything [fol. 1037] I would like to know what it was. The open announcement of terms I had to meet was very agreeable to me.

Revere did not give concessions before the Institute because it did not think it good business. We have always made a policy of giving each customer of ours exactly the same prices and terms as the others and giving one man a concession that we did not give everybody upset that theory. We had followed that policy for a great many years and we believed that it was the best policy and the policy that paid us the best returns in good will of our customers and in cash receipts to ourselves. As a general rule the customer who receives a concession over his competitors in the same territory uses it to cut into his competitor's business. If we knew that a competitor of one of our customers was getting concessions from someone else we felt that we should make our price so that our customer would be in a position to meet his competitor. We cut the price openly. We never cut in any other way.

By the end of 1927 it had become very hard for a refiner who was isolated as we are to really keep tabs on everything competitors were doing. Conditions changed daily

[fol. 1038] and it was expensive to keep cutting our price to meet them. In certain localities we stopped selling sugar because it was not worth while. We had all kinds of complaints from our customers. They complained they were not able to compete on even terms with those who were receiving various kinds of concessions and threatened to stop buying from us unless we met them. When we did not meet them they stopped buying.

I did not sign any written agreement or any arrangement with any of the refiners in connection with Code Interpretations, resolutions or recommendations. I did not state to any of the refiners I would be bound by and follow any of the resolutions and recommendations. I did not tell anybody connected with the Institute that I would. None of my competitors asked me to state that I would follow the resolutions and recommendations of the Institute. None of the people connected with the Institute asked me to make such a statement.

We have always reported the sales of damaged sugar to the Institute after they were made. I never advised the Institute in advance of the sales. I did not as a matter of practice advise the Institute in advance that I proposed to make sales. I did not get permission from the Institute before selling damaged sugar nor did I ask for permission. [fol. 1039] The first time I saw Exhibit 430-I was 4 or 5 days ago. I did not know that Judge Ballou wrote the letter at the time and had no conversation with him about writing it. He did not tell me he was going to write such a letter to Douglass. I did not ask Judge Ballou for permission to sell the sugar. He did not give me permission because I did not ask for it.

Shortly after the formation of the Institute there were no guaranty terms in effect in the Chicago and Milwaukee districts and at that time Revere did considerable business there. During the summer of 1928 the refiners established guaranty contracts and as Revere did not meet the guaranty, its sales in that territory dropped off.

We had a large quantity of sugar moving by the C. A. T. lines which was in storage in Newport, Vermont, and when the sugar finally reached Chicago and Milwaukee there was no sale for it. About 16,000 bags stayed in the warehouse and finally became badly warehouse-set. When sugar re-

mains in a warehouse for a long time it becomes set in the bags and is not as readily salable as good merchandiseable sugar. Knowing that a sale of that quantity of sugar at a special price would start a rumor that Revere was cutting its openly announced price and terms, I told a number [fol. 1040] of the refiners after an Institute meeting that Revere was going to sell the sugar as damaged at whatever price we could get for it and that they would hear an announcement from us in the course of a few days. When I returned to Boston I notified our sales manager to sell it, to notify the Institute in the regular way and to mention that was the sugar I had spoken of a day or two before. There was no question of asking or giving permission. It was simply a statement of what we were going to do. I did not notify the Institute in advance that I was going to sell sugar. The letters in Exhibit Y-3 are those from Revere to the Institute in connection with the sale of damaged sugar and are the only letters or notifications which Revere addressed to the Institute in connection with that particular sale.

Defendant's Exhibit Y-3 was received in evidence.

Cross-examination.

By Mr. Fly:

The minutes of the board of directors of the Institute of December 13-14, 1928, page 4, reading

"During the discussion Worcester referred to the fact that Revere had a limited quantity of sugar at Milwaukee and Chicago shipped before guaranties in Chicago went into effect which it was desirous of closing out at a concession without guaranty, because of his policy of not selling on guaranty. The matter was referred to the executive secretary."

do not refresh my recollection at all.

On the move of March 4, 1930, we hoped the price would stop where we made the drop. I noticed that the raws within a few days preceding that had dropped almost 30¢.

I have been a director of the Institute continuously and at various times have been a member of the Enforcement [fol. 1041] Committee, chairman of the Ethics Committee,

member of the Executive Committee and vice-president of the Institute. Prior to the Institute I do not recall that Revere put out any sugar in private brands. I do not recall that we were ever asked to put them out. If we had been I should have declined because I do not think it would be good business and would upset our manufacturing facilities.

Prior to the Institute we should have been reluctant to reprice in the case of a decline. Revere did not do it as a matter of policy but may have done it in a certain number of cases where it absolutely had to to keep in line with the action of certain competitors and to protect its own customers.

Prior to the Institute our policy was always to invoice all sugar sold during the day at the lowest price we quoted that day. I am not sure whether or not there were definite provisions against repricing in the early days of the Institute. I have no recollection of the question arising in connection with any of our contracts but if it had come up I probably would have followed the resolution and changed the policy of our company as regarded that particular question.

[fol. 1042] Late in 1927 we entered into a contract with Edgar under the terms of which we each gave up something. It was a type of contract offered to any of our customers in a position to use it. It was not based upon quantity, but was available to all buyers who would agree to take a certain amount of sugar at intervals over a long period of time. Under the terms of this contract we charged Edgar 10 cents under our current list price on the dates the sugar was shipped. The buyer, however, had to forego the privilege of buying on a price advance. We thought that was a fair contract, not involving a concession in any way, shape or manner. We offered it to a good many of our other customers if we thought it was advantageous to both of us to have such a contract. We had other contracts with other customers of a similar nature. We did not announce them in our telegraphic notices to the trade generally. At the time we thought it was good business to make a contract of that sort.

We changed our policy as regards that general type of contract upon the formation of the Institute because we considered it was not selling upon our openly announced prices and terms.

At the time of the formation of the Institute we did not intend to have any brokers who were also warehousemen. [fol. 1043] We have stored in Edgar's warehouse from time to time for a great many years, but I don't believe we ever used Edgar as our broker. We stopped storing in that warehouse after the Institute had eliminated broker-warehousemen because if we found he was a broker we would naturally have stopped storing in his warehouse. We did not change our policy in that respect at all. It was never our policy to store in a broker's warehouse if the broker was our broker. If we knew a warehouseman acted as broker for other refiners, we were very likely not to store with him.

As part of the Institute's service the Institute wires us on price change announcements made by our competitors. We did not systematically receive that sort of service prior to the formation of the Institute. We got our notices through the brokers and practically always had the information. Sometimes we received the notices the moment they were sent out. If they were sent out before 3:00 o'clock we received them.

When we make a price move we prepare our message and send it to the Postal Telegraph and the Western Union companies with a long list of the people, including the Institute, to whom it is to be sent. We call our local trade in Boston on the telephone. We do not send out any telegrams before [fol. 1044] the list goes out. That is our general notice except as we telephone to the local trade. Our competitors' names were not on this list before or since the Institute. Our policy was not changed. We only added the Institute's name to the list of the ticker service, brokers, etc. We added one name to a long list of people. I was aware that the Institute would immediately telegraph our competitiors exactly the same as brokers and others did before the Institute. Before the Institute was formed we sometimes received notices late in the day and at all hours of the night.

Our prices and our competitors' prices are exactly the same. A change of price in Texas would not affect us at all until it affected the prices of people who competed with us and then we would have to meet that competition. In practice, it is a very short time. Sometimes it would be in the course of a day, sometimes within a very few hours. It very seldom takes over a day.

A price change of 5¢ or 10¢ will generally sweep the country in a period of a very few hours, particularly if it is a drop. We had that same system prior to the Institute and the selling prices were exactly the same as the list prices are now. They were uniform. They had to be.

[fol. 1045] We felt that we had an accurate and sufficient means of determining the prices of our competitors in the territory before the Institute. We felt we could get very close to them and that our information was accurate and efficient. We may have been mistaken.

Redirect examination.

By Mr. Peck:

We did not decline our price more than 10¢ on March 4 when refined dropped 10¢ and raw 30¢, because we never wanted to go any lower than we absolutely had to. We do not endeavor to make our declines commensurate with the immediate action in all markets. We are governed in the last analysis by what the market demands. A decline in the market price of raw sugar does not mean a commensurate decline in our inventory of raw sugar. We may not have bought any raw sugar on the decline. We do not feel there is any obligation to keep an absolutely certain margin between raw and refined. Our desire is to get as good a price for the raw sugar raised in our own plantations in Cuba, through the refined, as we possibly can and as competitive conditions allow. There is often considerable difference between the cost of our raws and our inventory and the daily quotations. The quotations on raw do not have anything to do with the cost of raw sugars one has on hand.

[fol. 1046] The Edgar contract provided for the purchase of a certain amount of sugar weekly. The price was to be based on a quoted price on the day of delivery from which there was a discount of 10¢ per 100 pounds. We had similar contracts which were generally known. We quoted them "standing order" contracts and Revere had them for many years. They were available to any customers to whom they would be valuable. We never refused a customer who asked for such a contract. We tried to sell them because they were to our advantage. Other refiners were giving concessions of all kinds which we did not and it gave us a little talking point to have a contract like that to offer. There was nothing secret about the contract.

Mr. Fly: Mr. Peck, I thought you had taken the attitude that anything that was not published in the papers was secret?

The Witness: We never published anything in the papers.

I regarded as correct the information we received as to our competitors' price changes before the Institute. We knew our competitors' changes and list prices and selling prices although we did not have accurate information about concessions.

Recross-examination.

By Mr. Fly:

In buying raw sugar we tried to buy at the low. Sometimes we were successful in that effort, at other times we were not. We buy very little raw sugar and refine principally our own raws.

[fol. 1047] Our records show that we continued to reprice after the Institute just as we had done in the past. Apparently repricing as of the opening day was violated in the early days of the Institute.

In joining the Institute we felt that if business were conducted on a high moral plane it would be more pleasant for everybody concerned. There is certainly no pleasure in doing business if you feel your competitors are cheating all the time. We hoped that if our competitors adhered to the prices they announced instead of giving secret cuts, our opportunities in a competitive field would be greater and that it would be more profitable to us.

Prior to the formation of the Institute I did not give agents of our competitors the right to inspect the books and papers of our own company. Prior to the formation of the Institute we did not make systematic reports of any kind to our competitors, such as a report of melt, stocks on hand, withdrawals, state of 30-day contracts, delinquencies and the like.

I did not tell my competitors that I would not be bound by any of these resolutions and recommendations. I knew the Institute ordinarily depended upon the unanimous adoption of all measures by all the members. I expected [fol. 1048] to comply with any measure for which I voted. If it was something I did not believe proper I would not have voted for it. I always had the reservation of thinking it over afterwards and I was at perfect liberty to withdraw.

I felt that our competitors, if they voted for a resolution, would carry it out or else announce they were not going to.

I realize that a breach of the Code of Ethics by one of our competitors, even if resulting in a competitive disadvantage to us, would not justify our violation of the Code of Ethics.

Prior to the Institute we entered into certain contracts providing for deliveries over periods beyond 30 days. The policy of our company was open to change from time to time as circumstances warranted. After the adoption of the policy which provided refiners should openly announce their terms there was no longer any reason for us to attempt to give contracts of that type. We did not feel that it was necessary or advisable, either for us or our customers. We did not make any further contracts for deliveries beyond 30 days. We could have made them if we had openly announced them. We felt perfectly free to do anything as long as we announced it openly. We understood that the main provision of the Code of Ethics was prices [fol. 1049] openly announced. If there was a Code provision against contracts for more than 30 days or a resolution of the board, we expected to comply with it. I am not familiar with the contracts of all the members of the Institute outside of my own. I am not aware of any contract of any member of the Institute since the formation of the Institute providing for delivery beyond 30 days.

Prior to the formation of the Institute, as a general policy, our company did not accept trade acceptances in lieu of cash payments and permit regular cash discounts upon them although there may have been some individual cases, where we accepted a trade acceptance as a means of getting our money.

We had no system of advertising allowances prior to the Institute.

In voting for the adoption of various uniform terms at the Institute meetings we were not changing our general policies. We did change some of our terms because the necessity for them had disappeared.

In 1929 the discount period was 2% 7 days but it has been the practice of the trade for a great many years to consider that when payment was made within 10 days the terms of the contract were fulfilled. We continued to give 3 days' grace as we had always done. We still give the 3 days' grace.

Prior to the Institute we had 2 consignment points in New England. They were both given up. American and Revere stored at Portland, Maine, making an extra [fol. 1050] charge for delivery from consignment. I think Revere, American and perhaps National had a consignment stock in Providence but it was practically eliminated before any consideration by the Institute because of the fact that trucking had become so prevalent that there was no further need of keeping consigned stocks there and the expense was more than the business justified. The Institute took action on consignment points. Providence had already been eliminated. I am not sure about Portland. The Institute recommended that consignment points be eliminated where we did not think they served a useful purpose. I presume that was the reason the Institute took that action and in conformity therewith these companies withdrew. We had a few consignment points outside of New England, at Milwaukee, Chicago, Detroit, Toledo, Buffalo and perhaps Fort Wayne. We probably withdrew them at the same time the other companies withdrew and we were glad to do so.

Redirect examination.

By Mr. Peck:

We have not eliminated consignment points since the Institute. I should say we probably have more consignment points since the Institute, compared with the number before. Consignment points are not as regular and fixed a [fol. 1051] proposition as with most refiners because we only consign at places where we sell surplus sugar and we might have a consignment point in one place and it might not be a consignment point for us again in a year. We do not do the volume of consignment business that most refiners do.

[fol. 1052] WILLIAM H. HOODLESS was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am vice-president and general manager of the Pennsylvania Sugar Company of Philadelphia. I have been vice-president since 1928 and manager since 1913.

Prior to 1928, for a period of 7 years, Pennsylvania acted merely as a manufacturing agent for another company, either Atkin & Company or Lowry & Company, and was paid a fixed amount for manufacturing sugar which was disposed of by the company with whom we had the contract. We also had a joint account with Lowry whereby we participated in the profits and losses and filled up with those sugars to take care of our capacity. We have been selling our own sugar since 1928.

I determine the price policy of Pennsylvania, which includes the making of price changes. I take into consideration various factors in determining whether I think, in making a price move, it will go through. The primary thought in my mind is to establish a price which will provide an adequate margin, which we have never had since the start of the Institute. The factors which cause a change in price are the general situation in regard to withdrawals and the opinions of brokers, collected through our sales office, as [fol. 1053] to the demand of the consuming public and the price of raw sugar. Another factor is our desire to get contracts on our books when we have a long position and when previous contracts are pretty well used up. If any of our competitors change the price upward and in my judgment I think there is a fair chance it will go through on account of the surrounding circumstances and the 3 factors I mentioned, I follow. If I do not think so, I do not follow. If a competitor reduces his price I almost invariably follow.

I have not discussed with any of my competitors our price changes before making them. I have never told any of them what we were going to do with regard to price, that we were going to raise the price or ask them to follow if we did raise. I have never asked our competitors to follow our price changes. They have not told me what they intended to do about their prices nor have they asked me to follow their prices nor have they asked me if I would follow them. I have never suggested to any of my competitors that they raise prices or that they do not lower them. They have not suggested that I raise my price nor have they asked me not to lower it or maintain it. I have never discussed the foregoing matters with any of the staff of the Institute. None of them have ever made any suggestion as [fol. 1054] to our prices. I have never suggested to any of the staff of the Institute that they approach any of our competitors about their price changes.

On June 26, 1928, we advanced from 5.80 to 5.90. After our advance there was a drop in refined of about 30¢ between May 25 and June 26 whereas raws dropped from 4.52 to 4.33.

On June 25 our refined contracts were practically cleaned up, orders on hand being only 77,000 bags. It was the season of the year when a heavy demand was expected and our brokers advised that there would be a large amount of business offered. There were indications that the trade was pretty well cleaned up on their previous contracts.

On November 10 we led an advance from 5.10 to 5.20 effective November 12. There had been a rise in the raw market from 3.77 to 3.90 between November 8 and November 10 and we were very anxious to place some business as our old orders were pretty well cleaned up.

On January 6 Pennsylvania announced a decline from 5.15 to 5.10 and then an advance to 5.20. In our judgment we looked for an advance in raw prices. We declined to 5.10 before announcing an advance to 5.20 with the idea of stimulating a buying move.

[fol. 1055] Another refiner had established 2 prices, 5.10 for spot contracts and 5.15 for 30-day contracts, which we met. On that move such business as was taken was written at 5.10. The price did not hold. It was nullified by some refiner declining his price to 4.95 on February 10. At the same time they made the price retroactive to January 6. We necessarily followed that decline and made our price retroactive on all contracts. We actually received 4.95 for the business written at 5.10 on January 6 and, although we collected the higher price, we had to refund customers.

On April 3, 1930, we advanced from 4.70 to 4.90 effective at the opening of business on April 4. On April 2 there had been a decline of .30 from 5.00 to 4.70. We didn't think events quite justified it and we thought we might be able to start a move that would go through.

On August 20 we announced an advance from 4.35 to 4.50 to become effective on the 22nd. We had a lot of refined sugar on hand and we tried to precipitate a move to get business, but it didn't work. It was not followed by other refiners and we had to return to the old basis. There was no move at that time.

On March 5, 1931, we announced a decline from 4.50 on the opening of that day to 4.40 and an advance on the open-

[fol. 1056] ing of March 7 to 4.50. We went down and up

right away to encourage buying at the lower level and to get some business on our books. It was not met by the other refiners and fell through. We did not get the move because the advance was not met by our competitors, though the decline was. We had to return to the lower price.

On May 18 we announced effective May 20 an advance from 4.40 to 4.50. There had been 2 months since there had been any market move and we thought possibly we could precipitate one by that. We tried but were unsuccessful. Our advance was followed by a decline by one of our competitors. We advanced from 4.40 to 4.50 but Imperial declined to 4.45 and we had to follow.

On October 7 we announced an advance from 4.50 to 4.60 effective October 8. Our contracts were pretty well cleaned up at the time and our brokers advised that they thought there would be a buying move. We were successful in that operation.

On January 6, 1931, we led an advance from 4.55 to 4.70. At that time there was a meeting of international sugar growers in Brussels for the purpose of curtailing crops. There was an advance in the raw market between January [fol. 1057] 2 and January 7 from 3.18 to 3.40.

We joined the institute for several reasons. We thought the principles embodied in the proposed Code of Ethics represented decent business principles. We expected that a great deal of useful statistical information would be disseminated by the Institute and further we were really starting on a new course. After 7 years we had lost direct contact with the trade so that we were under the necessity of forming a new sales organization and of determining what policy we were to pursue. There were 2 policies followed by the refiners at that time. C. & H. and Arbuckle had a policy which differed from that of most of the refiners. We had not reached a decision before the question of the formation of the Institute came up. We had to decide whether to sell on open prices publicly announced or have a price list from which there would be a deviation as circumstances warranted and by which we could make trades with the people. The policy embodied in the Code of Ethics made it a much simpler matter for us to start with open and publicly announced prices.

It agreed with my views and with the views of the executives of the company that we should do business upon openly announced prices. It would have been more diffi-

cult for us to do business on the other policy, of ferreting [fol. 1058] out secret concessions. We believed the open price system was the proper one for doing business because we believe we ought to do business on a fair basis with everybody. By the other method we would have had to rob Peter to pay Paul.

Cross-examination.

By Mr. Rice:

Before the Institute there was no well-known selling basis on which every refiner sold sugar to his customers. C. & H. and Arbuckle had a known selling basis. I do not know what Revere's policy was because I did not come in contact with them.

The policy of the other refiners was to have a list price which was a matter of public knowledge and a sales price which was more or less a matter of public knowledge. The sales price was below the list price. The refiners had, first, a list price, second, a sales price which was more or less known and, third, a price which was determined by the various rebates given to many.

Prior to the formation of the Institute the refiners did not know what secret rebates their competitors were giving to the trade.

My source of information was Atkin and later Lowry, [fol. 1059] who sold the sugar which we refined.

Lowry had a list price and they had another price that was more or less openly known below the list price and they gave rebates to certain customers. The rebates took various forms. They stored sugar in a buyer's warehouse and paid him storage on it or gave him some sort of cash rebate.

Since the Institute was formed I have determined our price changes independently of our competitors and the Institute. I have likewise determined all elements of price independently.

I acted independently in meeting competition after the formation of the Institute.

Referring to the resolution set forth in the minutes of the directors' meetings of August 1 and 2, 1929, affirmatively authorizing members to meet competition in southern territory as they found it, the situation was this:

Sprague of Savannah reported that competition in this territory was such that he intended to resign from the Institute because he did not intend to meet that competition in any way except by open announcements if he remained a member of the Institute. He was told he did not have to leave the Institute to meet that sort of competition, that there was no restriction in regard to that. There was no [fol. 1060] restriction before the resolution was adopted.

Referring to page 9 of the minutes of the first meeting of the Executive Committee of January 18, 1928, the Philadelphia refiners continued the same trucking allowance that they had before the Institute. The agreement referred to was made before the Institute. When it was formed this matter was taken up and I insisted on continuing with the 3¢ allowance and that it would cost us more than 3¢ to make the deliveries ourselves.

The only tolling contract I had after the Institute was with Western of San Francisco. I entered into a contract with Sullivan to refine a carload of sugar for him at a certain stated amount. I stipulated in the contract that I would not refine that sugar for him if he sold it in territory in which I did business. After it was tolled, about 6,000 or 7,000 tons, or perhaps as much as 180,000 bags, were shipped to Chicago.

After joining the Institute I always regarded myself free to enter into contracts for periods for longer than 30 days.

At the time of the organization meetings of the Institute in December, 1927, I felt under a moral obligation not to make contracts of 30-days or longer than 30 days if there were any concessions connected with them and naturally [fol. 1061] I supposed the others left with that moral obligation in mind. The moral obligation arose because we were trying to work out some principles which were to be the basis of a code of ethics upon which we*re* were going to found a trade association or institute and we talked about those principles. They were carried to Washington and submitted to the Attorney General. Necessarily I felt under a moral obligation not to break the principles which were incorporated in the document and concerning which we were going to ask the views of the Attorney General as to whether we could work under those principles. The backbone of the Code of Ethics is the provision for selling sugar at openly announced prices.

I felt I had perfect moral freedom to enter into contracts for periods beyond 30 days if there were no concessions. I never agreed with my competitors not to enter into contracts beyond 30 days.

The Code Interpretation of February 17, 1929, regarding 30-day contracts is merely a recommendation but one does not have to follow it. There is nothing in that that is binding on me as to how I am to run my business. If I did not follow that recommendation and entered into a long-term contract I would make a public announcement of it to everybody. If I followed the absolute wording of that [fol. 1062] recommendation I would not enter into a contract beyond 30 days.

At one time I was appointed a member of a committee which considered contracts for manufacturers extending beyond 30 days. It was not understood prior to that discussion that we were not to enter into contracts for longer than 30 days.

It was a rigid practice during some period of the Institute for members to report the amount of their balances at the end of a 30-day contract. The purpose was to see that sugar sold under a 30-day contract had been delivered during that period. They wanted to see that it had been taken out because they thought that if refiners made contracts for 30 days and some of them were not carried out, there was discrimination in favor of buyers who did not take the sugar out until the end of 50 or 60 days. We used to send in reports showing the amount of sugar which had not been delivered at the end of 30 days. We were frequently reminded by the Institute that we had balances that had not been delivered at the end of 30 days. The purpose was to stir up deliveries. Exhibit 419-T was an alibi letter and written to bring a little pressure on the customer to take out his sugar.

[fol. 1063] I never blacklisted warehouses or brokers.

Redirect examination.

By Mr. Peck:

At the directors' meeting of August 2, 1929, in connection with the Savannah situation, Sprague said he wished to resign from the Institute, giving as his reason that he had competition from off-shore sugars in his territory. It was

giving him a great deal of concern and worry and he intended to meet that competition as best he saw fit. The competition was not openly announced and therefore he wanted to resign and to do what he could to meet it. He was told he had a perfect right to meet competition and a resolution was passed so as to make it absolutely clear in his mind the way he could meet the situation. He was to meet it in his own way and that applied to everybody.

Prior to 1928 the Philadelphia refiners had been making a trucking allowance of 3¢ if customers called at the refineries for sugar and provided the amount was above the minimum allowance of 70 bags, or 7,000 pounds. The directors' meeting of January 18, 1928, was for the purpose of making an open announcement in regard to that situation. Before the Institute it had not been openly announced but it was well-known to everyone. We discussed the situation [fol. 1064] because the Code provided we were to make a public announcement of all prices and terms and this was one of them. We thought it proper to announce we were continuing the practice, which existed before the Institute's formation.

I do not know the occasion of my writing Exhibit 398. The letter is in connection with the reporting of any contracts of an unusual nature that we had on our books at the beginning of the Institute. It was understood that we would report any contracts that were then in force which carried concessions of any kind. In connection with our proposed policy of open prices publicly announced, we wanted to know of the existence of any such contracts. The 30-day contract was the usual one and the concessions seemed to be in connection with long-term contracts. The question arose because it appeared that Godchaux had such a contract. Revere also had a long term contract of some sort.

Recross-examination.

By Mr. Rice:

The general purpose of the resolution of August 2, 1929 was to make it clear that Savannah had the right to meet competition. My understanding was they could meet any sort of competition by simply announcing it. It was limited to southern territory because Sprague, a southern refiner,

[fol. 1065] who is a friend of mine, came up to resign. I wanted to try to disabuse his mind of the idea that it was necessary for him to resign from the Institute if he desired to meet competition. It was just putting in a formal way the right that he had.

[fol. 1066] LOUIS R. CAMPIGLIA was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am vice-president in charge of sales of the California & Hawaiian Sugar Refining Corporation, San Francisco, and have held that position since 1926. Prior to that time I was sales manager and assistant sales manager. I have been with C. & H. since October, 1919.

I have charge of making the announcements of the C. & H. price changes to the trade. I am familiar with the manner in which C. & H. price changes are made and announcements made prior to and since the formation of the Institute. I am also familiar with the manner in which C. & H. has received information as to price changes of other refiners, both before and since the Institute.

After we decided to make a change in price we sent telegrams to all the brokers in the western part of the country and to the head office of our brokerage concern in the central part of the country and sometimes we telephoned. We also gave information to the newspapers in San Francisco and to the San Francisco office of the Associated Press.

The brokers were instructed to notify all our customers [fol. 1067] and potential buyers of the prices we were quoting. Prior to the formation of the Institute we did not advise Daub & Carr of our price changes. They received the information from our broker, the Seavey & Flarsheim Brokerage Company in Kansas City. Since the formation of the Institute I have used the same methods in announcing price changes. C. & H. sent announcements of price changes to the Institute for a period of a few weeks after its formation. We do not send any now.

We received information regularly as to price changes of other refiners prior to the formation of the Institute

from the trade, from our brokers for our territory and from the brokers in the New York market. From New York we had wire service which came from reporting agencies, such as Willett & Gray, Lamborne & Company and Daub & Carr. The service included not only the price changes of the refiners but also general market information, such as market fluctuations, crop conditions, etc.

Since the formation of the Institute we have received information in the same manner. There may have been some changes in the reporting agency but substantially it was the same. During the period we received this information from the Institute it came at approximately the same time as we received it from other sources although in most [fol. 1068] cases it was later.

In determining price changes I consulted with Rolph, president of the company up to the time of his retirement in 1931, and since then with his successor or with one of the other executives.

I never consulted with any of my competitors about price changes. I never told them the change in price we intended to make or advised them in advance what our price changes were going to be. I never advised them we would follow any price changes they might initiate and they have never asked us to follow such price changes. They have not suggested that we advance or lower our price and I have not suggested to them that they advance or lower theirs. No member of the staff of the Institute ever suggested what we should do about our prices and I have never advised any of the staff what we intended to do about them. I have never asked any of the staff to intervene with any of the refiners about their price changes.

The factors which influence me in determining price changes are the condition and trend of the raw market and the condition of our own stock. The amount of stock on hand would influence us as to price changes. At times we have a quantity of sugar on hand which we are anxious to move and which we feel can be moved by naming a lower [fol. 1069] price or a higher price, depending upon the condition of the market. The demand on the part of buyers at the time and the prices of competitors are other factors. After buyers have bought a quantity of sugar they are usually not in the market again for a further quantity until

these original purchases have been used up. Roughly speaking, the trade generally anticipates its requirements for from 4 to 8 weeks. The season of the year has something to do with demand. There is a larger consumption of sugar in the summer months.

Our competitors' price has something to do with our action. We could not charge a higher price than they and get any business. If one of them reduces his price, we must decide then whether to meet it or whether to pass the business. As far as I can remember we have always met the price. When a competitor advances his price we do not always advance ours. Whether we follow a competitor's advance depends on factors which I have just mentioned. If we do not think the raw market justifies a change in price or there is sufficient opportunity to sell sugar, we do not follow. We always exercise our independent judgment on that subject.

On January 7, 1929, American announced an increase in price from 5.15 to 5.20 effective at the opening of business [fol. 1070] January 8. We did not follow but announced a reduction to 5.00 and then increased to 5.15 the next day. At the time we had a considerable quantity of sugar on hand. The new crop of raws was beginning to arrive at the refinery and we were anxious to clean up the stock and make room for the new sugar. We thought we could not move our sugars by joining the advance from 5.15 to 5.20 but that we could move them more readily by lowering the price. Accordingly we reduced to 5.00 and then advanced to 5.15 and the sugar was thereafter sold at 5.00.

On May 9, 1929, Godchaux announced an advance from 4.90 to 5.00 effective at the opening May 11 that was followed by certain refiners but not by C. & H. On the contrary I reduced to 4.75 effective May 9. The reason was that a considerable quantity of secondhand sugars which had been booked at a previous trend at a lower price were offered in the market. In addition, we did not feel that the condition of the raw market was such as to merit our expectations of receiving any appreciable quantity of sugar booked at 4.90 and had we advanced from 4.90 to 5.00, secondhand dealers would have received the bulk of the business and we would not have received our share.

[fol. 1071] "Secondhand" is a term applied to sugars that are resold. The original wholesale buyer will, after

his purchase, resell direct to another wholesale buyer and, having bought them at a lower price than the then current market, is able to sell them at less than the current price. Until such sugars are disposed of, the refiner who is attempting to sell at a higher price than the quotation of the secondhand sugars, receives no business. We always considered that a sufficient volume of secondhand sugars made the market and not the current quotations of the refiners.

On June 6 Revere announced an advance from 4.50 to 4.60 effective June 9 followed by various refiners. We did not follow. Imperial withdrew their announcement and others followed. We did not advance our price because we felt there was some uncertainty as to the immediate trend of the raw market. We were not satisfied that it would go higher than it was or even stay as high as it was. In case the market had gone lower we might have felt it necessary to drop the price. There was no purpose in putting it up one day and dropping it the next. A week later we advanced from 4.50 to 4.60 effective at the opening of busi- [fol. 1072] ness June 17. The raw market had given some signs of strength. Evidently we were wrong in our first estimate and when we found that out we decided to change our price.

On June 27 C. & H. declined from 4.70 to 4.60 effective at the opening of business that day and then made an advance from 4.60 to 4.70 effective at the opening of business July 1. At that time, although the raw market apparently justified an advance in the price to 4.70, when the advance was made, some of the refiners had kept their price at 4.60. We expected that situation to continue because there was no buying in the market but when the 4.70 price became firm on the part of different refiners there was more buying and we had to go back to 4.60 or else not participate in the business that was being done. We went back to 4.60 to be on a competitive basis with the other refiners and then advanced to 4.70. On that occasion sugar was sold at 4.60.

On October 10, 1930 Godchaux announced an advance from 4.45 to 4.55 but we did not follow. That was one of the cases where we did not feel the raw market had justified an advance and we did not change our price. On October 14 we followed Revere's advance from 4.45 to 4.55. There [fol. 1073] must have been a change in the raw market in the meantime or we would not have decided to advance.

On March 5, 1931, Pennsylvania announced a decline to 4.40 at the opening of business that day, followed by an advance to 4.50 at the opening of March 7 and C. & H. was among the refiners who did not follow. That was another case of some uncertainty in the raw market and while we were delaying our decision we found that other refiners had not advanced and unless they did we felt we could not.

On March 20 American announced an advance from 4.40 to 4.50 which we did not follow and on April 19 they announced an advance from 4.40 to 4.50 effective at the opening of the 21st. Our announcement at that time stated we were not following the advance, awaiting the course of the raw market to shape up and in the meantime there was a decline on the part of some other refiners which prevented an advance on our part if we had considered it. When Arbuckle declined we followed. Shortly after Arbuckle declined we initiated an advance from 4.35 to 4.50 on March 24 effective on the 26th because in the meantime the raw market had advanced considerably and the margin which could be secured from the low basis of price brought about [fol. 1074] about by the decline was inadequate. Raws were higher and we felt refined prices should be higher.

On June 1 C. & H. announced an advance from 4.35 to 4.45 effective at the opening of business June 3. There had been a considerable advance in the raw market at that time, raws rising from 3.11 to 3.23 and we felt that an advance in the refined would bring the price more in line with the cost of the raw material.

On June 18 American announced an advance from 4.45 to 4.55 effective at the opening June 20. We did not follow but announced a decline to 4.40. That followed shortly after a former advance which we made the first part of June and there was evidently a large volume on that particular move. There was a large volume of secondhand sugars being offered to the trade at less than the 4.45 price. Unless we were able to sell our sugar at the price at which a large volume was being offered, although it was not the price of refiners, we could not secure any business.

On August 25 we initiated a decline from 4.75 to 4.60 because there had been a decline in the raw market. The price had been going down gradually for some time and we moved ours in line with the rest.

On September 2 we declined from 4.60 to 4.55 and on [fol. 1075] September 3 made it retroactive to September

1. That was a continuation of the same idea. There was a further decline in raws and in our opinion a further adjustment of the refined price was necessary. It was made retroactive 2 days because the guaranty which had been in effect expired about September 1 or a day after we had been contemplating a decline for several days. If we had deliberately delayed our decline until our guaranty had expired, the trade would have felt they were taking an unnecessary loss, since the raw market justified a drop.

We do not endeavor to avoid announcing a price decline during the 30-day period following an advance for the purpose of avoiding making good on our guaranty. We believe we have an obligation to deliver sugar at what we consider a proper price and we do not deliberately attempt to hold up the price. The 30-day guaranty continues for 30 days after shipment from refinery and there is transit time. Our guaranty is to the date of arrival and the transit time from the Pacific to the central market is 12 days. For that reason we have advanced 12 days beyond the contract [fol. 1076] period as the limit of the term of our guaranty. The guaranty actually runs up to the time of delivery, which is 42 days but not longer than 42 days. In declines in guaranty territory within 42 days the guaranty is operative on sugars that have not been delivered or have not arrived. The guaranty territory does not include all territory west of Chicago. It is only the central part of the country and part of the south. In the 11 western states we have no guaranty on contracts. We have a guaranty to date of arrival on spot business.

On December 10 C. & H. dropped its price from 4.40 to 4.20 because the trade was hesitant about buying and because of the weakness of the raw market and because raws had declined and refined had not followed. Our brokers told us that if the price were brought nearly into line with the market the buying would be in larger volume and the trade could anticipate its wants more freely.

C. & H. joined the Institute in September, 1929. We were invited to join when it was formed but did not because prior to its formation there had been a movement started by the beet people to form a trade association in the west [fol. 1077] central part of the country. We felt that we were in a way committed to join with the beet people in the West with whom our interests were more in common,

as we operate in a territory where they sell most of their sugar. We did not feel that it was necessary to belong to 2 trade associations, both operating along practically similar lines and having similar purposes.

We changed our minds and later joined the Institute, feeling that it was accomplishing some things that were desirable to us. It had organized a statistical service and, even though we were not members of the Institute, we furnished our figures to them so that these figures would be complete and we had been receiving that service. It had been conducting an advertising campaign through which we hoped to see some improvement in the distribution of sugar, by an increase in the volume for all sellers. Also there were some phases of competition, such as delivery of sugar within the contract period announced by the refiners, that did not seem to be working smoothly. It was represented to us that, since we had always advocated open prices and terms, we would be of some assistance in strengthening and helping the Institute and we finally decided to join.

Statistics that the Institute compiled gave us the distribution by states which we had never been able to secure [fol. 1078] before. It gave us a comparison with distribution of former years by states and it gave us the quantities of stocks of raw and refined sugars on hand. It permitted us to determine whether stocks were piling up and accumulating or moving out freely to the trade and many things which we considered valuable.

We have always followed the policy of selling on open prices and terms and since the Institute have not changed that policy which began in 1906 when C. & H. was organized.

Generally we did not store with customers but prior to the spring of 1927 we were storing in some customers' warehouses. About that time we had sufficient experience to feel that it was a very undesirable method of doing business. It could not be done with all customers. It would have been possible to carry assortments and stocks sufficient for that, so we were storing with some and not with others.

The refiner is dependent on the customer to report withdrawals of sugar which is stored in a customer's warehouse because under the plan the sugar is invoiced to him as he

uses it or withdraws it from the stock which is stored with him. It became very evident that those reports of withdrawals were irregular and inaccurate.

[fol. 1079] We had such difficulty and annoyance in storing in customers' warehouses that we decided it was not a desirable or satisfactory thing for us to do and therefore we discontinued it early in 1927. The attitude of customers with whom we were not storing had something to do with our discontinuing the practice. The complaint was that storage with one customer, which was not granted to another, gave the one who did not have the storage a disadvantage which amounted to discrimination because the customer who did not have the storage was buying his sugar, taking it promptly and paying for it as received, while the man who stored in his own warehouse had the opportunity of paying when he was ready.

We did not employ auditors to check our stocks at customers' warehouses or any stocks at all because it would have been too big a job.

Defendants' Exhibit G-4 was received in evidence.

At the time Exhibit G-4 was sent out our company discontinued storing with customers.

Prior to the formation of the Institute we stored in regular warehouses which had a customer's affiliation. About the [fol. 1080] same time we discontinued storing in some of the warehouses of that type. There may have been others which we did not discontinue at that time. We may not have known exactly what their status was.

Cross-examination.

By Mr. Fly:

A group of plantations in the Hawaiian Islands owns C. & H. Various groups own the plantations. The plantation corporations own the stock in our corporation.

The Domestic Sugar Bureau was actually organized in May 1928.

Prior to the formation of the Institute we only sold on open prices and terms publicly announced and had no form of rebate, secret or otherwise. With the formation of the Institute we hoped that we might have a more profitable business and be able to conduct it with less difficulty and annoyance. We wanted to see concessions, allowances, secret prac-

tices discontinued and to get competition into the open so we could tell what it was and more easily decide whether or not we could meet it. Because of concessions we felt we really could not tell what prices we had to meet in particular localities.

We did not report our changes in prices to the Institute because our counsel objected to it.

[fol. 1081] In 1928 and the early part of 1929 we did not store in customers' warehouses. We did not desire to store in any warehouse that had an affiliation or connection with buyers. We preferred to store with warehouses that were in the business of storing and nothing else. At that time, for competitive reasons, we did store in some warehouses in which customers had some interest.

Some of our competitors were storing in affiliated warehouses and we felt that in order to hold the trade of that particular customer we had to do it too. We ceased to store in such warehouses when our competitors did. We did it after the Institute held an investigation and issued a notice that the warehouse was disqualified.

On May 10, 1929, there was an advance of the list price to 5.00 and afterwards the price stayed there quite a while. My recollection of that move is that the reduction of the price to 4.75 is what created the buying of sugar and the placing of orders. I had in my notebook "March 6 sales," "Market lower," and "Did not warrant booking at 4.90." March 6 was to refresh my memory that the secondhand sales that were being offered were sugars that had been sold on the March 6 move. We decided that we were not warranted in selling at 4.90 so we dropped to 4.75. We probably had on [fol. 1082] our books a fairly large volume of business as our trade had covered their requirements for several weeks ahead and there was no buying in the market. The trend of the raws was slightly down at the time. I did not consider the price high for 1929. The reason for raising that price to 5.00 and maintaining it over that period was because we felt at that time the price could very well be 5.00. We also felt that the booking should be made at 4.75 instead of 4.90. We felt 4.75 was a reasonable price at which to sell sugar.

On June 17 Godchaux announced a decline. At the time of that announcement raws had gone down somewhat from the move of May 10. Their decline on June 17 to 4.85 was to meet the decline of a competitor refiner although at the

time of the decline there was a considerably wider indicated margin than we had at the time of the previous move.

Raws are not purchased on the same day that the refined is sold. They are purchased over many days at an average higher or lower than the quotation. The reason for the price going to 5.00 on May 10 was our desire to raise the price of sugar and receive a better return. On May 10 the market was ripe for a move. There was nothing in the market to [fol. 1083] indicate that there should be a drop nor to indicate why it should go back to 5.00 instead of the level it had left. We felt that the market would go to 5.00, but that in our opinion the proper sales price was 5.75 and not 4.90, so we took business at 4.75.

I would like to correct the testimony I gave yesterday in connection with our withdrawal from certain types of warehouses in March, 1927. Prior to 1926 it was against our policy to store in customers' and affiliated warehouses. Late in 1926 and until May, 1927, we stored in some customers' affiliated warehouses. We ceased to store in any such warehouses in May, 1927. In the middle of 1928 we stored in warehouses, the status of which was not clear under the Code Interpretations but did not store in customers' warehouses. We had to do this because of competitive conditions and to avoid the loss of a large volume of business since other refiners were storing in such warehouses.

A system was then provided by the Institute for the investigation of the exact status of warehouses. If, after such investigation, we were convinced that the warehouse was affiliated we determined ourselves to withdraw from those warehouses. We alone could not withdraw from these without suffering an undue competitive disadvantage, but withdrew as soon as our competitors did.

At the time we withdrew from these warehouses, along with our competitors and pursuant to Institute action, the controlling consideration was a question as to whether or not our competitors would get out of there at the same time we did.

[fol. 1084] When we stored with the A. B. C. Warehouse I did not know that it had buyer aliations. We had information from our representatives and brokers that it was not affiliated with a buyer. In 1929 they brought to our attention that the A. B. C. Warehouse was operated by the A. B. C. Candy Company which bought a certain quantity

of sugar. After a considerable investigation on our part and the information we secured from reports of the Institute investigation we finally withdrew from that warehouse. I do not know of any records where it had improperly handled our sugar.

Petitioner's Exhibit 463 was received in evidence.

Rolph and I not only had personal conferences with Institute representatives but we kept in constant touch by telephone and telegraph with the Institute and discussed with it a number of problems with which we were currently concerned. We consulted with the Institute and the Bureau about interpretations of the Code and principles of the Code. We only took up with the Bureau and the Institute Code interpretations concerning which there was an apparent question. If we thought the Code was clear we would then decide what we should do without asking them whether [fol. 1085] we should act one way or another.

We hoped, in joining the Domestic Sugar Bureau at the outset and at the same time cooperating with the Institute, to see that the codes and the practices of the 2 organizaions were similar and that eventually the 2 would amalgamate. We felt that both trade associations should follow fair trade practices and that they should be adopted by one the same as by the other. There were some differences because of territorial peculiarities and the nature of the beet business, but generally the fair trade practices and the underlying principle of openly announced prices and terms should be the same or one association would not be successful without the other.

Early in January, 1928, several gentlemen from the Institute met Rolph and myself at Chicago for the purpose of discussing the subject of a price guaranty. Foster, Hoodless, Spreckels and Judge Ballou were at the meeting. They said that the guaranty was not a necessary thing; that it was costly; that since the raw sugar purchases were not guaranteed, the refined sugar which was sold after being made from those raws should not carry a guaranty; that it put a burden on the refiners that they could not stand; and that it resulted in some discrimination and dis- [fol. 1086] advantage because it applied in one section of the country and not in the other. They also said that along the border line and operating in the same territory were buyers and manufacturers, some of whom had no guaranty

and who were at a competitive disadvantage with those who received a guaranty. They tried to convince us that it was not necessary for us and it was not proper. We did not agree with them or with their ideas. We have always believed that a guaranty is necessary because of our location on the western coast, having to ship into the central part of the country with longer transit time and selling against spot storage stock of beet competitors. They told us that if we continued the guaranty in the territory that they would probably find it necessary to do likewise.

May 9, 1929, which was after a move in March, was a date which everybody remembers. A considerable quantity of secondhand sugars was in the market and we did not think the raw market warranted bookings at 4.90. We also had a carry-over from 1928 which was larger than usual. We reduced our basis because we thought 4.75 was the proper point to put the price. Because of the informa-
[fol. 1087] tion which the trade had I felt the 4.90 price was not justified.

The Institute took up with us the question of our standardization of grades of confectioner's sugar, but they did not propose that we should increase our price .05. They called our attention to the difference in the grades which we were selling and the difference in the quotations that existed on those grades. We were in doubt as to what grades competitors were offering. Confectioner's sugar was offered under a variety of names and we did not know which of our grades corresponded to their grades. We had always felt that there should be standardization of grades and packages, that it was a proper and an economical thing to do and went into the whole subject with them. The Institute told us that it expected competitive action to meet our confectioner's AA grade.

Petitioner's Exhibits 464 and 465 were received in evidence.

By joining the Institute we expected to have less difficulty in completing our own contracts within the 30-day period. I expected the members to adhere to their prin-
[fol. 1088] ciple of openly announced prices and terms. I thought that on an announced sale for a period of 30, 40 or 60 days, delivery should be made in accordance with that announcement. We protested against instances, which we found from time to time in the trade, of extending deliv-

eries and insisted that members should adhere to terms which they had announced. It was probably one of the duties of the Enforcement Committee to see that contracts were enforced. I do not believe the committee did very much because we did not see much improvement in the delivery period. The Institute collected statistics in connection with deliveries, showing the quantity undelivered at the end of the contract period, and circulated that information to its members.

There was very keen competition in the Chicago market in 1926 and 1927. There were concessions, allowances and services. There were beet sellers, cane sellers, evrybody in the market. The eastern refiners and C. & H. were guaranteeing prices in that territory. We have had a lower price from time to time in Chicago territory than we had in the rest of the country since January 1928.

Petitioner's Exhibits 466 and 467 were received in evidence.

[fol. 1089] Redirect examination.

By Mr. Peck:

Prior to the formation of the Institute and since, C. & H. has guaranteed continuously in the Chicago market. Prior to the formation of the Institute it was also the practice of other refiners. There may have been a very short period after January 1928 when we did not guarantee.

At the present time C. & H. has contracts extending for more than 30 days. In 3 Pacific Coast states we offer a contract to canners and preservers of fruits and vegetables which extends during the packing season from June to September. The contracts are usually made between March and June and call for deliveries as needed by the packers up to September 30. This type of contract was introduced in 1924 and we have used it from that day without interruption. The same contract is offered by Western and by beet, cane and off-shore sellers in those 3 states.

In 1927 the secret allowances, concessions and rebates were becoming more extensive all the time. Eastern and southern refiners were offering more extensively specials to certain customers and taking customers away from us in one locality after another. We attempted to meet the [fol. 1090] situation by making a price to our own cus-

tomers which was, so far as we could determine, the same as the price which competitors may have been making to only a few customers.

It was not always easy to find out how much of a concession a customer was receiving or what customers were receiving concessions. When we did have sufficient information we met them by making a reduction in our price list. That was a very expensive thing for us to do and imposed considerable penalty on us by giving the price openly to all our customers, whereas our competitors may have given it only to some of them. We sell and did sell at that time a relatively large proportion of our business in the Mississippi Valley and central states, whereas the southern and eastern competitors sold a relatively small portion of their products there. It was an expensive condition for us. Our price policy made us accept very low prices for sugar because of frequent necessity of cutting our price in an attempt to meet the concession system. It reached a point where we were not sure whether or not our open price policy would be adequate to meet the special concession system of competitors. We did not know whether we could do that and still stay in business or whether we would maintain our open price policy and lose [fol. 1091] all our trade.

Customers who had been buying from us over a period of years were lost. They told us that our price did not enable them to meet competition and there were requests for allowances of various kinds and if they were not met we usually lost the trade. We knew what our competitors' list price was and what their selling basis was. Their selling basis was the price at which they were willing to sell any one and the price under which concessions were usually made. They quoted it to the trade generally and it was not difficult to find out. We had difficulty because we did not know what the concessions were. In some cases they were so many points below the selling basis. Even if we reduced our price we did not know where we were because of competitors' special agreements to give a concession of a certain number of points below the selling basis.

We hoped that members would observe their openly announced prices and terms and make their deliveries within the contract period which they had specified at the time of sale. At that time contracts were not being enforced. De-

liveries were extended beyond the expiration date, sometimes a few days, sometimes many days.

[fol. 1092] Page 2 of Exhibit 467 refers to the consideration we gave to extensive price war by reducing the beet differential. We probably have considered that once every 2 or 3 days since I have been with the company.

Cross-examination.

By Mr. Fly.

There has always been close cooperation between the Institute and the Domestic Sugar Bureau in promoting the fair trade practices involved in the Code of Ethics and the Interpretations of the Bureau and the Institute.

At one time I was advised that our desire to continue a contract beyond 30 days for the canners on the Pacific Coast was the subject matter of a discussion at the Institute. We were questioned about our contracts on the Coast and some objections were probably made to them.

I remember seeing some proposed contracts or plans for a manufacturer's contract to be applied in all territory. So far as I know it was never adopted. I do not know of any member companies that have entered into contracts for periods beyond 30 days.

We have operated chiefly in the 11 western states and the Mississippi Valley states in the central part of the country, including Texas, Louisiana and Arkansas. In recent years we have also operated in the Middle West and the Chicago territory.

[fol. 1093] The selling basis of one refiner is the same as that of another. I ascertained that by the prices which they quoted to the trade through their brokers. I could tell whether a particular sale was made at an individual concession or at the so-called selling basis simply on the information we could get from the buyers. As soon as we were told by the trade that our price was not low enough and that they could buy sugars for less than we were quoting them, we became convinced that concessions were being made. In fact, some buyers indicated that if we were to continue to sell them we would have to give them an advertising or storage allowance or some sort of an allowance other than a straight price concession. Advertising and warehouse allowances were made under the selling basis

and were the ones that were hard to determine. That type of concession did not go to make up the selling basis of the selling company.

Redirect examination.

By Mr. Peck:

Our selling price was not the same in all territory at all times. At times our price on the Pacific Coast varied or differed from the price in the central part of the country.

Defendants' Exhibits H-4 and I-4 were received in evidence.

[fol. 1094] PAUL M. RIPLEY was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Browning:

I am and have been since 1917 traffic manager of the American Sugar Refining Company and its subsidiaries. I am in direct charge of the transportation of its sugars and the incidental problems arising in connection therewith. I am president of the American Sugar Transit Corporation, a company owning and operating 4 cargo ships in the Cuban and Porto Rican trade and also in the coastwise, intercoastal and South American trade. I first entered business in 1902 with the Atchison, Topeka & Santa Fe Railroad and was with them until 1908. I then came to New York and was put in charge of the traffic department of the Phelps-Dodge Corporation, operating large copper and coal properties and 11 miles of railroad in New Mexico, Arizona and Old Mexico.

From 1924 to 1926 I was president of the National Industrial Traffic League, a national organization of shippers composed of practically all the large industrial traffic managers of the country and the traffic managers of almost all the chambers of commerce in the United States. I am on the executive committee and chairman of the budget of the In-
[fol. 1095] terstate Commerce Commission and am admitted to practice before the Commission.

I am chairman of the American Steamship Owners Association which includes practically all the operators of American flag tonnage on the Atlantic, the Gulf and the Pacific.

I have been on various committees of the Institute. We never had a formal traffic committee. Traffic problems were submitted to us informally and I sat on numerous committees of that character. When connected with the Santa Fe Railroad I dealt with traffic problems and occupied practically every position from a clerk in the local freight office to freight rate clerk in the general freight office. When I was with Phelps-Dodge I was concerned with the management of a railroad. I have been a student of traffic problems and intimately associated with them since 1902.

American sells in practically all of the United States except the 11 western states. That condition has existed ever since I have been in the industry and prior thereto to the best of my knowledge and belief. Since 1917 I have been intimately in constant touch with the sugar transportation situation in all parts of the United States except the 11 western states and I have a general knowledge of the situation in them.

[fol. 1096] Defendants' Exhibit J-4 was received in evidence.

The Savannah refinery is located 7.7 miles from the City of Savannah. Imperial is located approximately 80 miles from Galveston and is not on the water.

Refiners normally have the same base price at the refinery. They have the same selling base, using the term in the sense that the price they are usually getting from most people even though it was under the list and even though it was over the price paid by buyers obtaining concessions.

Transportation costs materially affect the sales of sugar because, with the same f. o. b. refinery price, the cost of getting the sugar from the refinery to the ultimate destination becomes a very important element. Taking Chicago as an example, at the time the Institute was formed the all-rail rate from New York was 56½¢, from Philadelphia 54½¢, from Baltimore 53½¢, from Savannah 56½¢, from Louisiana 54¢, from Texas 57¢ and from San Francisco 84¢. If each refiner had sold f. o. b. refinery and permitted the

sugar to move freight collect, it would have meant that each refiner would have been restricted to that zone where [fol. 1097] his rates were as low or lower than any other refiner's.

Defendants' Exhibit K-4 was received in evidence.

There was no material change which would have affected Exhibit K-4 substantially from January 1 on. Since March 30, 1931 we have had a revision of the rates in what we call Central Freight and Trunk Line territory, effective December 3, 1931 which changed some of the boundaries in the territory east of the Mississippi and north of the Ohio.

The refiners did not restrict their sales area to the exact territory where they had the lowest rates. They shipped into the territory where the rate of the competing refiner was lower and absorbed the additional freight. This policy existed throughout the whole period that I have been in the business. Normally refiners did not sell far beyond their natural areas, with the exception of Pacific Coast refiners who absorb very material sums. When I first came with American it had a rule that it would not absorb over 10¢ or 15¢ per 100 pounds but the normal absorption was less than that. When I first went with the industry, the Pacific Coast refiners absorbed 25¢ and latterly, due to a re- [fol. 1098] vision in the freight rate structure, they absorbed 30¢ when entering the Chicago market. I would say practically all the refiners sell in Chicago though Texas was a very limited seller.

The sales area of refiners with refineries located at the same points varied somewhat. Some of the refiners of the North Atlantic would sell in the southeastern states of North and South Carolina. Others would not. The sales area changed from time to time beginning in 1917. Sometimes it was the change in freight rates that occasioned withdrawing from markets and entering into other markets and at other times it was simply a company policy.

Refined cane sugars are generally quoted f. o. b. the refinery and our contracts so specified. The contracts also carried a provision that seller's ruling freight basis or freight applications were to be added to the basis price or f. o. b. refinery price in arriving at the price at ultimate destination. The ruling freight basis is the same as the re-

finer's freight application. Normally it was the actual rail rate. The freight application or ruling freight basis is the amount which the customer pays for transportation as distinguished from what the refiner pays for transportation [fol. 1099] for getting the sugar from the refinery to the destination. If a refiner enjoys a lower all-rail rate to a given point, his freight application would be exactly equal to that rate, but in other cases when a refiner absorbs that is not true.

Some refiners did not prepay the freight but billed at the f. o. b. price plus the amount of the freight application and deducted from the invoice the amount of the freight that the customer actually had to pay to destination. The result would be exactly the same as if the shipment had been prepaid and the refiner had invoiced at the base price plus the freight application. The refiner announced the freight application, never the freight absorption because the customer was not interested in the freight absorption.

Prior to the Institute the general formula for freight applications in the eastern territory (the area east of the Buffalo-Pittsburgh line) was the New York, Philadelphia or Baltimore rate, whichever was lower.

The freight application was generally the lowest all-rail rate from any refinery to a given destination. Other refiners who wished to sell in the territory announced the freight selling basis that the lowest refiners had and absorbed the [fol. 1100] difference.

There were two general exceptions to the rule. The first was the Central Freight Association territory, where the rate from Baltimore was generally 1¢ less than the Philadelphia rate, which in turn was 2¢ less than the rate from New York. This territory includes the area north of the Ohio River, west of the Pittsburgh-Buffalo line and takes in a small portion of the State of West Virginia and points in Kentucky along the Ohio River. It extends as far west as the Mississippi River. The freight application in the Central Freight Association territory was the Philadelphia rate or the New Orleans rate, whichever was lower.

We built the Baltimore refinery in 1922 primarily to take care of the south Atlantic states and also the C. F. A. territory. Our contracts specifically provide that we have the option of shipping sugar from any of our plants. We make certain grades in New York which we do not make in Balti-

more and we make certain grades in Philadelphia which we do not make in Baltimore. Therefore, the amounts which we might pick up by ship from Baltimore to the C. F. A. territory, where our freight application is 1¢ higher than the actual rate, were offset by the loss incurred when we had to forward from our New York plant to take care of [fol. 1101] the assortments that Baltimore did not make.

The second exception to the general rule was in Texas where the freight selling basis was the New Orleans all-rail rate, whereas the local rate from the Texas refineries at that time was less than the New Orleans all-rail rate. The Texas refineries sold on the New Orleans all-rail rate and we at New Orleans, not wishing to absorb any more than we absolutely had to, did not break down the selling basis to the Texas rate. The Texas refiners enjoyed a substantial freight pick-up. The normal difference between the New Orleans and Texas rate from 1921 to July, 1928, was 17¢.

Since the formation of the Institute the Baltimore exception has not only almost completely disappeared but we find our selling bases in that territory are actually less than the actual rate that we are paying from Baltimore. Instead of enjoying a freight profit in the C. F. A. territory, American now has a material freight loss. The freight profit of the Texas refiner has likewise completely disappeared and instead of a freight profit they are taking material absorptions.

The situation of the beet sugar plants located in the middle section of the United States was exactly the opposite. It [fol. 1102] had been the universal practice of the beet producers of Ohio, Michigan, Indiana, Wisconsin and Minnesota to sell on the freight application of cane sugar refiners. In Michigan, where the Philadelphia all-rail rate of 45¢ was made the selling basis at destination, the beet sugar producers, with a freight rate averaging from 13¢ to 25¢ or 30¢ for 100 pounds, have in all cases sold on the basis of the Philadelphia all-rail rate and picked up the difference. The beet sugar producers have taken over and used the cane sugar application with a resulting profit to the beet sugar producers in a great majority of cases. That applied to all beet sugar producers in all parts of the country.

A differential route is the circuitous route which, on account of the disabilities of transportation by that route, will permit rates less than the all-rail rate between the same points of origin and destination. A differential route ordi-

narily involves a water haul of some character and involves trans-shipment. Some of the differential lines had two water hauls with a number of trans-shipments. They are uniformly cheaper and slower than the standard route to the same destination. Many of them operate for only a part of the year.

[fol. 1103] Defendants' Exhibit L-4 was received in evidence.

The territory on the map which shows the cross-hatching is governed by National Despatch rates. This is not necessarily a correct statement because certain railroads operating in the Michigan territory have through rates with the National Despatch Grand Trunk route. In other words, destinations on the Grand Trunk Railway in that area would enjoy a differential via this route, whereas a point on the Michigan Central which might be cross-country therefrom would not have the same differential.

The areas shown here as enjoying differential rates do not in any way signify that rate was an all-rail rate or differential rate from other points of origin that are lower than the differential rate via the routes shown on the individual Exhibits. In other words, on the National Despatch map the rates to points west of Chicago from Louisiana by rail or via the National Barge Line are less than the National Despatch Line further east.

The map showing the territory to which the Federal Barge Line's quoted rate applied includes North Carolina, South Carolina and Georgia. The Federal Barge Line rate in that area is no lower than the Savanah all-rail rate. In [fol. 1104] North Carolina the Baltimore rates are lower and likewise the Savannah rates to the northeastern sections of Alabama are less than the Federal Barge Line from Louisiana. The Baltimore rate to Virginia is materially lower than the Federal Barge Line rate and the Savannah rate to all of North Carolina, South Carolina and Georgia is lower than the Federal Barge Line. There are a few points on the Georgia border where the Federal Barge rate and the rail rate are the same or might be 1¢ or 2¢ less than the Federal Barge rate from New Orleans. In addition to the all-rail rate and route, particularly in the Middle West, there were a number of differential routes with still other rates.

Prior to the Institute, on a shipment moving by the differential route, a customer paid handling costs and paid a differential rate which was the exact rate over the route travelled. If he purchased ex consignment he paid the lowest all-rail application which was the rate for direct shipment from the nearest refinery by a standard all-rail route.

Prior to the Institute freight application changes were most infrequent and were only made when there were revisions in freight rates. An exception to the rule existed in the so-called seasonal swing. During the summer in [fol. 1105] the area of the Lake Erie ports and the area west of Lake Michigan, particularly around Chicago, the rates are lower than the all-rail rates from the South.

At the close of navigation each year the carriers cancel their tariffs or suspend application of the rail-and-lake rate thereon. At the opening of navigation each year these tariffs are again restored by publication on statutory notice with the Interstate Commerce Commission. There is a suspension because of the lack of availability of lake-and-rail route and, while those routes are not available, it has been the practice not to sell sugar on a rate which was not available.

The term "proper freight application", commonly used by people in the sugar business prior to the Institute, simply meant "What is the actual rate you are using in selling sugar in a particular market?" It was the practice, prior to the Institute, to base a freight application upon the actual rate of some carrier from some refining point. Freight applications which are not based upon some actual rate are ordinarily called "arbitrary applications".

Prior to the Institute we had a bulletin board in our general sales office which set forth the freight applications [fol. 1106] in the various areas. When changes were made they were placed on our bulletin board in our sales office and the brokers came in and learned what the application was and in turn transmitted it to the trade. We learned of these changes from street gossip and from brokers coming into our office and informing us and from the trade at interior points. I frequently have met competitors on the street and they have told me of the proposed changes, which were very infrequent and only followed a revision in freight rates.

We have followed the exact practice that we had followed prior to the Institute with the single exception that now a copy of our notice is taken to the Institute by the same messenger who posts it in the general sales office.

Customarily we announced the change in a freight application to become effective immediately. When meeting competition announced by a competitor we make it in many cases retroactive to the date when he made his change. The proportion of our changes which are announced to take effect in the future is so small that it is hard to give a percentage, but I would say roughly that it might be ½ of 1%. Announcing a change in the future is usually caused by a [fol. 1107] revision in the freight rates. For instance, we had on January 3, 1932 an increase of 2¢ per 100 pounds in all freight rates in the country which totalled 20¢ or more. That was under an order of the Interstate Commerce Commission in what is commonly known as the "15% Case". In that case we announced that, effective on the date that these increases went into effect, we would add 2¢ per 100 pounds to our freight selling bases.

All refiners must, from force of competition, have the same freight application in the same market at the same time because a buyer will not pay any more to any seller in a market where he can obtain this standard commodity from another seller. If we fail to meet a lower freight application announced by a competitor, we simply go out of the market. This was the true situation prior to the Institute and has been true since its formation. There has been no change whatsoever.

Prior to the Institute secret concessions were given to purchasers through the medium of freight applications.

Exhibits Y-1 and Z-1 are tare sheets of National. Sugar has long been sold and invoiced on a per pound basis, that is, upon the actual weight of the sugar, not including the [fol. 1108] weight of the package. Freight charges, however, are assessed by all the carriers on the combined weight of the sugar and the package, while, as a matter of accounting practice, the customer deducted the 2% cash discount on the entire invoice, including the freight charges. The refiner did not in fact desire to give him a 2% cash discount on the amount of freight charges since the refiner had prepaid these. In order to simplify the invoicing, refiners for many years added the differential called

"tare" to the actual freight rates. By the addition of the tare, a freight charge on sugar and the package was in effect converted to a freight charge per pound on the actual sugar sold and there was added the 2% cash discount on the freight charges which later were to be deducted as the total amount of the invoice.

Our company almost universally uses the words "plus tare." We announce a freight selling application of 24¢ and then in brackets "plus tare" and that immediately brings to the minds of everyone that we are going to add the tare basis. All refiners do not announce a rate plus tare. Some announce the actual figures. For instance, if they desire to sell on the basis of a freight rate of 41¢ they [fol. 1109] will simply announce their freight selling basis or freight selling application on bags at 41.2 and other figures on other packages.

By "actual" we mean the freight rate without the tare and by "actual application" we mean the actual application without the tare. The actual plus the tare makes up what is known as the refiners' prepay. The calculation of the tare has not changed in any respect since the Institute.

I have been continuously consulted by the staff of the Institute regarding transportation questions. Two principles of the Code of Ethics involve transportation. The first one is paragraph A which provides for openly announced prices and terms, "terms" meaning freight applications, selling bases, as well as other things. The second was the famous Code clause 3(c) which has to do with the use of differential rates on consignments or otherwise than on direct shipments over differential routes at the customer's request.

The second principle was very dear to Judge Ballou and a subject of conversation between us almost from the start of the Institute. It was an ideal which he felt could be carried out in the industry. To sell transportation at less [fol. 1110] than actual cost he thought was uneconomic, unsound and put an undue burden on buyers in the markets that might be in competition with a market where differential rates were being granted to buyers on deliveries from consignment or on shipments that were handled via other than differential routes.

Deliveries from consignment, as far as service to a customer was concerned, was even better than an all-rail ship-

ment. It gave him a spot delivery and eliminated responsibility as to price declines and transportation risks. The cost to the refiners was in most cases higher than the differential. In all cases it was higher than the actual cost of handling via the differential routes because a delivery out of consignment meant we had to pay the warehousing charges, interest on our money, fire insurance and similar expenses. It actually cost the refiner in excess of the freight rate which he paid.

It often happened that the refiners were absorbing to meet the lowest all-rail rate from another refining point, but the Code clause was never construed as applicable to this situation. Application of the principle against absorb- [fol. 1111] ing to meet a lower all-rail rate would have restricted each refiner to the territory where its rates were as low or lower than those of any other refiner.

Except in the case of C. & H. and Western, who had to make material absorptions to meet the New Orleans rate in the Chicago market, refiners meeting a lower rail rate had to absorb about 2¢. Transportation was never sold above cost with the historic exception of the Baltimore and Texas situations.

I think Judge Ballou recognized weakness in his principle which existed when a refiner did not have the advantage of a differential route. The refiner without the differential route was unable to compete with the refiner who enjoyed one. If this principle had been carried out a refiner would have been practically restricted to the market which enjoyed a differential rate and service. The difficulty developed immediately.

Every differential route in the country was available to American but all refiners were not in the same position. [fol. 1112] In April, 1928, shortly after the formation of the Institute, the question of this Code Interpretation arose. Judge Ballou endeavored to uphold the Code principle of using differential rates only on shipments that actually moved via the differential routes. Savannah, located at Port Wentworth, Georgia, had no differential rate into northeastern Alabama, whereas the New Orleans refiner had the advantage of the Federal Barge Line operating via Mobile and the Warrior River up the Black River to Tom Bigbee waters and thence by rail to these destinations. That meant as a practical matter under the Code American

could ship a customer at his request via the barge route and the rate would be 6¢ or 7¢ less than the rail rate. The all-rail rate from Savannah was less than the all-rail rate from New Orleans. The use of the differential enabled us to sell in the area where Savannah sold on an all-rail basis. Under the Code the customer in Alabama could obtain sugar either ex-consignment or by direct rail shipment from the refinery at the lowest all-rail rate. He also had the option of taking a barge shipment at a rate 6¢ or 7¢ below the New Orleans all-rail application.

[fol. 1113] Savannah protested immediately and Judge Ballou called a conference. The argument of Savannah was absolutely unanswerable. It openly announced it would apply the Mississippi-Warrior rate on all shipments from their refinery. New Orleans refiners immediately had to meet the service conditions and announced they would sell on the same basis at the Mississippi-Warrior barge-and-rail rate and ship the goods via the all-rail route. The transportation cost principle went out of the window in Alabama almost immediately, in April or the first part of May 1928. The customers always took the better service except in very occasional instances when they desired to delay the delivery of sugar because of local conditions. After this announcement, when we found customers who wanted barge service, we were delighted to furnish it because it meant we would not have to absorb the difference between the all-rail and differential rates.

Almost simultaneously a similar situation arose in the Illinois district immediately adjacent to Chicago. Western announced that at the opening of navigation in 1928 they would apply as their freight selling basis at lake ports, the Philadelphia lake-and-rail rate. In the East, American [fol. 1114] had the lake-and-rail service to offer to customers with the differential rate. Western had no differential service from the Pacific Coast. It had only all-rail service as it did not start to operate through the canal until the latter part of 1928. The rate from San Francisco to New Orleans was approximately 27¢ and the barge rate from New Orleans to Chicago was 44¢. In 1929 Western shipped through New York and their basis at San Francisco at that time was 27¢ and additional incidental costs. It took about 18 to 20 days to ship through the canal. The eastern refiners had at least a 27¢ advantage over them.

The freight selling basis was broken down to the lake-and-rail application which was the Philadelphia lake-and-rail rate. Although Judge Ballou endeavored to uphold the Code principle, he again failed. He explained to Western that the announcement of lake-and-rail rates in this particular area was a violation of Code rule 3(c) because it was transporting sugar from the Pacific Coast, giving all rail service and selling on the rail-and-lake basis. Western claimed that it had to meet what it thought was competition from the East.

(Defendants' counsel stated that the following Exhibits refer to the Alabama situation: 245, 330, part of 419, 452-A [fol. 1115] to Z-2, 457-L, O, P, S, W, X, C-1, N-1, O-1, A-2, B-2, and the following to the Chicago and Middle West situation: 139, 457-A to E, F, I, J, K, N, Q, T, U, A-1, D-1 to G-1, R-1 to X-1, E-3, U-3, 458.)

The breakdown in Alabama immediately extended to Tennessee, Kentucky and some points in southern Indiana. The breakdown in the Chicago area extended to points in Illinois and certain points in Minnesota and Wisconsin.

Defendants' Exhibit M-4 was received in evidence.

The application of Code principles in 1928 next arose at New Bern, North Carolina. The freight selling basis prior to the Institute was the Baltimore ocean-and-rail rate of 39½¢. In December, 1927, there was a breakdown at New Bern and the selling price actually applied by the refiners in that market was made 11¢ plus tare.

On August 30, 1928, under an order of the Interstate Commerce Commission, the rates on sugar from Baltimore, New York and Philadelphia to the southeastern area were all revised. Under that revision the Baltimore ocean-and-rail rate became 36¢. The refiner applied the lowest rate available, namely, the Baltimore ocean-and-rail rate of 36¢. [fol. 1116] The Savannah rate under that decision was 38¢. The 11¢ rate which was previously applied bore no relation to an actual rate. It was lower than any actual rate. Under the Code principle the Baltimore ocean-and-rail rate of 36¢ should have prevailed and accordingly on August 30 that rate was established at New Bern. It held only for a little over a month. It broke down and they announced a straight selling basis of 20¢ which was below actual cost.

I have seen Exhibit 393. The only freight application that I know of where an increase was put in effect as a result of the announcements acontained in those Exhibits was the New Bern rate selling application.

A similar situation arose at Wilmington, North Carolina, occasioned by the revision in the southeastern sugar rate structure. For a good many years the Clyde Line brought sugar from New York to Wilmington at a 20¢ rate. The actual Baltimore rate was 36¢ and the Savannah rate 34¢. Although every refiner using the Clyde Line service had the additional cost of between 5¢ and 6¢ for making delivery from the refinery to the docks of the steamship company by lighter or by truck, Wilmington continued to be sold on the 20¢ basis. We also absorbed the warehousing and insurance costs at the port. The Wil-
[fol. 1117] mington rate remained at 20¢ until the breakdown later on.

There were service charges due to absorption of switching charges at Wilmington. On July 26, 1929, we announced we would absorb the switching charge.

(Defendants' counsel stated that Exhibits 389-I-1, 447-Y and B-1 dealt with Wilmington.)

The rate to Pensacola, Florida, from New Orleans via the Mississippi-Warrior Line was 24¢. The New Orleans all-rail rate was 30¢. Prior to the Institute we were selling on the basis of 26¢, which was the Mississippi-Warrior rate plus insurance. On July 9, 1928 the freight selling basis was broken down to a port-to-port rate which we had from Baltimore via the Bull Steamship Company. That rate did not include marine insurance or cover the cost of lightering from our refinery in Baltimore to the dock of the Bull Steamship Company, but a flat basis of 21½¢ was applied. We took a loss equal to these incidental charges.

(Defendants' counsel stated Exhibits 457-B, B-1 and H-1 to K-1 dealt with the Pensacola situation.)

The Institute's efforts to remedy the Pensacola situation again resulted in failure and the freight selling basis broke
[fol. 1118] down. We are now selling Pensacola on a freight application of 11¢ which is lower than any rate from any refinery.

Defendants' Exhibit N-4 was received in evidence.

Judge Ballou's efforts in 1928 under the Code clause resulted in a complete failure each time.

The first delivered price announcement was made the latter part of April 1929 when the eastern refiners announced that they would sell at specific rates to specific points and declined to sell f.o.b. refinery for delivery at those points. A rate was charged irrespective of the route over which the shipment moved. The territory covered by this type of announcement were points on the New York Barge Canal and Lake Erie and Lake Michigan ports. There were later announcements of delivered prices which remained in effect for a substantial time. Delivered prices were in effect at some points in Wisconsin, some points in Illinois and latterly at a few points in Kentucky. A similar situation arose in the Southeast and delivered prices were first announced there in December 1929. The area covered by this announcement was Kentucky, Alabama and parts of Indi- [fol. 1119] ana. Delivered prices which were announced from canal-and-lake ports in 1929 were withdrawn in 1931. Delivered prices for the Warrior River area, Alabama, Kentucky, Tennessee and Indiana were announced in December 1929 and withdrawn in May 1930. The delivered price charged for the Warrior River area was the New Orleans or Savannah or Philadelphia all-rail rate, whichever was lowest. Delivered price announcements were made in 1930 for destination points in Illinois, Wisconsin and Minnesota but they were not followed by all refiners and as a result were almost immediately withdrawn.

In making its delivered price announcement American did not have any prior consultation with any competitor whatever or with any representative of the Institute. I do not know of any instance in which any competitor consulted with American in advance of making any delivered price announcements. I do not know of any instance in which any representative of the Institute consulted American with respect to making a delivered price announcement. The Institute did not, as far as I know, take any part in the delivered price announcements other than to relay them. As far as I know the announcements were relayed by the Institute in exactly the same way as other freight [fol. 1120] announcements were relayed. If American's delivered price announcements were not followed by all re-

finers, it withdrew them. The delivered price announcements which I have been describing are violations of the Code principles because under delivered prices we gave only rail rates and would not grant differential rates.

With the advent of delivered prices Judge Ballou gave up further efforts to enforce Code 3 (c). Taylor, after Judge Ballou's death, in the fall of 1929, never talked to me about the application of Code 3 (c). After the abandonment of this principle the Institute merely distributed the freight announcements of the individual refiners and published the loose-leaf resume of the individual announcements of each refiner. Before the abandonment of the principle, American, by its own announcement, violated the Code principle when it announced the application of a differential rate in the Southeast and the Chicago sections. No one in the Institute ever told us that American must follow that principle because we fully realized that we had the privilege of making any announcement we pleased and the Code so specified.

American receives the Institute's freight book. It is a loose-leaf service containing a resume of the freight selling [fol. 1121] announcements of each individual refiner. There is practically no material for the 11 western states. In each of the other states there is a summary of the announcements of each of the refiners who sells in that particular state. The freight book sheets contain merely a resume of the individual announcement of each refiner which we had already received. No one ever told me that the freight book was binding or obligatory in any respect. It was never considered so by my company. I never told anyone the freight book was obligatory. In many cases it is wrong. In the early days it was as much as 6 months behind announcements. Even today it is 2 to 5 weeks behind. The only purpose it has is, so far as my office is concerned, to assist me to check through to see that the Institute has correctly interpreted the announcements we have made and further that I have correctly interpreted the announcements of my competitors. When these announcements of the individual refiners come into me I have them checked against our freight selling basis and where we are out of line and wish to continue in the market, I advise the sales department.

American has its own freight book which is distributed [fol. 1122] to all the people in our organization who have

to do with sales and invoices. The American freight selling basis sheets are always kept up to date with its own announcements. It is the basis on which our sales and invoices are made. We have never, in any instance, invoiced or made sales on the basis of the Institute freight book.

There has been a tremendous increase in a number of freight selling application changes since the Institute. We now average 5 changes a day and some days we have as many as 10 or 15. They are announcements of freight selling applications of each of the refiners in various areas. Before the Institute the changes were almost nil and only came about when there was a revision in the freight rate structure by the carriers.

There has been no decrease in competition in the transportation field since the formation of the Institute. The competition on the transportation side has greatly increased.

Since the Institute, changes in freight applications have been downward in practically every instance. The New Bern situation, where it had been 11¢ and went up to 20¢, was later reduced and we are selling there at a 10¢ application. Today the freight applications are generally [fol. 1123] less than the lowest standard freight rates and also differential rates from any refinery. In other words, they are below many rail rates and many differential rates in a large area. In the State of Illinois we are selling today on the Federal Barge Line rate, less 9¢.

Customers do not buy f. o. b. refinery from us today. I wish they did because we are selling at less than any actual freight rate from any point of origin and we are absorbing the difference. If we were selling f. o. b. they would have to absorb it.

We have a canal-and-water rate from New York to Chicago in minimum quantities ranging from 250 to 500 tons which is less than the New Orleans water-and-rail rate of 40¢. Some shipments are being made on that route by brokers who consolidate several orders into a bargeload shipment. The rate from the East today, which is in the neighborhood of 27½¢ by the all-water route, is cheaper than the barge-load rate of 46¢ from New Orleans to Chicago. The water rate applies only to Illinois ports. The present freight selling basis at Chicago is not based on that formula. We have an arbitrary selling basis of 32¢. Ar-

buckle first announced the rate and everybody immediately followed.

I prepared the table in Exhibit O-4 from my records and [fol. 1124] from the printed tariffs of the various refiners. I took representative points in the different cities in the first column and tried to get the centers of population where our sales of sugar were made.

Defendants' Exhibit O-4 was received in evidence.

The absorptions shown in the last 3 columns are in all cases only the absorptions taken by the refiner with the lowest rate so that the refiner with higher rates competing in the same territory would have a correspondingly higher absorption. The freight application at Chicago was dropped since the preparation of this map. Today it is 32¢ whereas the lowest rate at the refinery is 51¢, causing an absorption of 19¢.

At Charleston, West Virginia, our freight selling basis has been broken down from 40¢ to 35¢. The lowest rail freight rate from any refinery is 38¢, so that we have an absorption at Charleston of 3¢ as against a former pick-up of 4¢. That pick-up applied to the Baltimore refinery. The pick-up was 1¢ in December 1927, the same December 31, 1929, but it increased to 4¢ December 31, 1930 because there was a general revision of the rates by the Interstate [fol. 1125] Commerce Commission on sugar from New York, Philadelphia and Baltimore to C. F. A. territory, where Charleston is located. In December 1927 the Texas refiner who had the lowest rate picked up 6½¢ at Tulsa, Oklahoma. That pick-up increased to 12¢ on December 31, 1930 because our freight application at Tulsa, Oklahoma, was the New Orleans all-rail rate, whereas the rate from Texas refineries was 53¢. In December 1927 we were under a different rate structure in this area. It was completely changed with the order of the Interstate Commerce Commission in the Southwestern Freight Cases which changed the relative adjustment of Louisiana versus Texas points of origin in Texas and in Oklahoma. Our freight selling basis at Tulsa today is 39¢. It is an arbitrary rate which is established by someone and is one which we announced to meet competition. The lowest freight rate from any refinery to Tulsa is 58¢ so that there is an absorption there by the refiner having the lowest all-rail rate of 19¢. Generally speaking, the freight loss or gain of the lowest re-

finer if shown at this time would show a tremendously greater freight absorption than on December 31, 1931. These developments have increased our freight absorption by tremendous amounts. American's freight absorptions [fol. 1126] for the first 5 months of this year are about $170,000.

We are always at odds on various freight rate adjustments with other refiners. We have contended with them not only before freight rate committees in the various sections of the country but we have litigated matters before the Interstate Commerce Commission. We have had more difficulties and more differences of opinion than previously because the Interstate Commerce Commission has revised certain rates that were not satisfactory to some and were highly satisfactory to others. We have continuously tried to have carriers' rates revised since the Institute. I have frequently discussed freight rates and freight applications with representatives of my competitors. My most intimate friends are traffic managers of my competitors. Our rate clerks give their opinions freely to the rate clerks of other refiners upon the interpretation of railroad tariffs. In my office I have approximately 5,000 railroad tariffs which are being supplemented, amended and reissued constantly.

When we were in these rate fights we got together, had meetings and in some cases employed joint counsel. We cooperated closely with our allies in the particular fights and in the preparation of those cases.

The actual railroad freight adjustment which occasioned [fol. 1127] our talking and having hearings before the Railroad Rate Committees are more frequent than they were prior to the Institute, when our rates were more stable. In these conversations I did not ask a competitor to increase or maintain a freight application. I never asked a competitor to reduce a freight application. A competitor never asked me to increase or maintain a freight application or to reduce one. My conversations with these men did not affect American's policy one iota. No competitor ever asked me for an assurance that I would follow any change in a freight application and I never asked a competitor for such assurance. I do not recall ever telling a competitor in advance of any change in a freight application which I proposed to make prior to our open announcement. No competitor ever gave me any such advance notice prior to an announcement. The Institute never

asked me to make or suggested that I make a change in any of our freight applications. As far as American was concerned we could live up to the transportation principle of the Code 100%. It was our competitors who were breaking it down. Our interests were completely served by the principle.

[fol. 1128] Counsel for the petitioner and the defendants entered into the following stipulation to eliminate the production of expert evidence on the question of transiting:

STIPULATION TO ELIMINATE EVIDENCE

It is stipulated that:

(1) The railroad tariffs relating to the transiting of sugar could reasonably and in good faith have been construed by the defendants to prohibit the transiting.

(a) of water borne sugars on rail billing, i. e., the substitution of sugar arriving at the transit point by water for sugar arriving by rail;

(b) of D. T. & I. sugar—i. e., the substitution of D. T. & I sugar for sugar arriving at the transit point by other rail lines for forwarding to points to which no joint rates are applicable via the D. T. & I.;

(c) Atlantic sugar on Gulf billing.

(2) If Mr. William J. Edwards, Manager of Trunk Line Weighing and Inspection Bureau, were called as a witness, he would testify that under the same transit tariffs as are applicable at Detroit, the substitution of water borne for rail sugar is not and never has been consented to at Buffalo; that sugar is stored in transit at Buffalo and that the railroads require the transit house operators to keep water borne and rail sugar segregated and to keep records which will prevent such substitution.

(4) No witness will be asked to give his opinion on the construction of the transit tariffs except in so far as such opinion was acted upon by a defendant.

(5) The question of whether such opinion concerning the construction of the tariffs was actually held by such

witness or defendant in good faith or was acted upon in good faith is left open.

The making of the above stipulation on the record is conditioned upon the agreement of Government counsel that they will not produce in evidence, refer to in argument, or use in cross-examination any of the papers secured by the subpoenas served on the railroads.

[fol. 1129] Counsel has previously asked me whether any refiner had ever attempted to influence me in maintaining a freight selling basis. I have thought of one case which possibly might be so construed. I do not think it was a case of trying to have me maintain a freight base, but rather to inform me of what the actual situation was. It had to do with a situation at Norfolk and as I recall Mr. Place telegraphed me, not being able to reach me on the telephone. He sent the telegram about May 21, 1929, a part of Exhibit 254, which reads:

"Understand you contemplating sixteen and a half cent rate Norfolk due McCahan announcement May 8th. Under this announcement we invoicing twenty and a half cents."

I do not want that to be understood as an effort on his part to influence me in any way in what I was doing at the time. There was a street rumor apparently to the effect that McCahan was protecting 16½¢ and he thought we had it and probably had heard a rumor to the effect that we were going down. I simply filed the telegram, did not respond to Place in any way and the basis of 21½¢ was not changed.

The Code provisions condemned the use of differential rates on deliveries from consignments or on any handling, other than in service via that actual differential route. On [fol. 1130] our delivered price announcements we specified the actual rates that would be used in those markets on all deliveries irrespective of the route taken by the shipment. Generally our delivered rate announcement was based on the standard all-rail application though in some cases it was a rail-and-lake application. Some buyers, even under delivered prices, for reasons of their own, such as lack of warehouse facilities or a desire to keep goods in transit, requested us to ship via differential routes, and the sugar was so handled even though they paid the delivered priced

freight application. They received more time to pay for sugar sent in that manner and that was a consideration. Such cases were rare but we did have them. The Code Interpretation which provided the customer had the right to ship over differential routes from refinery points, taking the slower service at his own cost and the risk of the market during transit, was no longer in force after the establishment of delivered prices. It was not rescinded but remained on the books until 1930 when it was repealed.
[fol. 1131] Ever since I have been with American it has reserved in its contracts the option of routing shipments. We do so as it is necessary to control the initial routing in order to arrange for the supply of cars, lighterage service and things of that character. We are also interested in what refinery we are going to ship from. The Institute has never taken up with us the matter of routing our shipments.

A diversion is a right which is commonly granted under a railroad tariff. This tariff, which is published by all railroads throughout the country, with one or two exceptions, gives the privilege of changing the destination or the consignee while the shipment is in transit, subject to certain rules as to just when the car can be diverted after it has reached the original destination. Under the diversion privilege, the through rate from the original point of origin to the ultimate destination is protected rather than the rate from the original point of origin to the point of diversion plus the rate from the point of diversion to the ultimate destination. The combination of locals is higher, in practically every case except when the rates break on a junction. In the eastern area the railroads charge 2.50 [fol. 1132] per car for this diversion and somewhat lesser an amount in the Southeast and the Southwest.

Prior to the Institute we were not interested in the transiting or diversion of shipments by customers because our freight bill bases were predicated on actual rates and we did not have these depressed applications where transiting could be accomplished. Furthermore, the customers had no desire to transit because we had the transited stock at transit points and he would have to pay additional warehousing charges. He paid the same freight application at the ultimate destination whether he ordered for that destination or took it at an intermediate point and transited it

beyond. He was not generally interested in transiting because a customer who was smart enough to find out how this could be manipulated and save 2¢ or 3¢ was generally smart enough to get a concession that amounted to materially greater amounts.

I never knew of the transfer of our transit billing prior to the formation of the Institute and do not think it was done. We used transit billing before the formation of the Institute because we desired to ship our sugars into the central markets where we could make quick deliveries to the adjoining territories. Under the transit arrangement [fol. 1133] we were able to get the through rate from the point of origin to the ultimate destination rather than a combination of local rates and save materially on our transportation charges. It enabled us to ship sugar to the ultimate destination on the through rate. We charged the customers the through rate on the standard application which generally was the all-rail rate from Philadelphia, in the eastern area, to destination.

I first learned that American's transit billing had been transferred to customers in April, 1930. In my opinion title to transit billing is vested in the consignee. The fact that we sell sugar on transit billing does not mean the transfer privilege automatically follows the sugar because we can ship the sugar to ourselves and instruct the carrier that we do not wish to avail ourselves of the transit privilege, or we can take no action for 10 days and by failing to advise the Bureau of our desire to receive the transit privilege, permit it to expire automatically, with the result that the sugar has no transit billing to follow. Formerly, the expiration date after registration with the Bureau was 6 months, but recently the time was extended to 12 months. Sugar shipped by water carrier has no transit privileges. [fol. 1134] All water carriers do not publish tariffs. If we were making delivery at Chicago of sugar and had waterborne sugar there or sugar on which no transit billing had been secured or had expired, our Chicago office was sure to make deliveries of sugar out of such stock wherever it possibly could.

Under transit tariffs the formal assignment of the goods is required from the original consignee in order to obtain the transit billing.

The first time I learned of transiting or diversion of shipments by a customer, after the Institute's formation, was in the fall of 1928, when the situation arose in South Carolina.

Defendants' Exhibit P-4 was received in evidence.

A complaint, filed with the Institute, alleged that our broker, H. F. Barkerding, at Charleston, was engaged in an effort to defeat the openly announced selling basis in South Carolina. Our openly announced freight selling application in this area was the lowest all-rail rate from any refinery, which was the Savannah rate. The broker was called to New [fol. 1135] York and we had a meeting at the Institute.

Barkerding was questioned and convinced those present that he was not manipulating and that selling prices were not being defeated. We in New York did not have any idea that this business was going on in South Carolina prior to the receipt of those complaints.

After another month the charges were again made that sugar was being sold at interior points in South Carolina at less than the openly announced freight selling applications. I was designated to go to Charleston in company with Savannah's traffic manager, W. W. Tommis, and there I met Perry, who was the sales representative of Hershey. We talked over the situation with Barkerding. I had a list of all the shipments which American had made in that year in the preceding three months and with those other gentlemen visited the freight offices of every railroad handling those shipments. I demanded that they show me just what had happened to each car. I found that the purchaser of sugar, I. Pearlman & Son, was given a bill of lading immediately after the sugar was loaded and diverted it to his own warehouse before it left Charleston.

We adopted a rule, which imposed no inconvenience on the consignee, requiring him to provide us with evidence of the [fol. 1136] actual delivery of the shipment at the interior destination and that evidence was something that he always had, namely, the freight bill of the carrier showing that the car had been delivered to that destination. All that he had to do in order to obtain the refund of this freight charge from Charleston to the interior destination was to enclose in the envelope with the check and the invoice the paid expense bill of the carrier at destination. That was the only

change we made on carload shipments. The announcement is contained in Exhibit 336.

All parties who were selling in that area made the same announcement. Savannah did not follow because there was no opportunity for manipulating sugars which Savannah shipped into that area. Savannah's sugar came direct from its refinery and was not shipped to Charleston. I made the suggestion that an early conference be called to discuss the handling of less than carload shipments because they presented a similar problem. We were accused of permitting buyers who had houses at interior Carolina points to receive sugar at Charleston in their own trucks. The accusation [fol. 1137] was that these trucks were doing exactly what was being done with carload shipments, namely, instead of trucking the stuff to the interior point they were making deliveries to the buyers' Charleston warehouses.

If we delivered to the truck at our warehouse in Charleston and the buyer stated it was destined to Moncks Corner we charged the Moncks Corner freight selling basis less what we understood to be the truck rate from Charleston to Moncks Corner. If a man came up with trucks to our warehouse at Charleston to purchase sugar he would have paid the basis price plus our freight selling application in Charleston, which was 20¢. If he presented an order for delivery at an interior South Carolina destination, he would be invoiced at the base price plus the freight application at the interior destination with a deduction of the motor truck cost from Charleston to that destination. Instead of driving the truck to the interior destination he simply turned it around and delivered it to his own warehouse in the city. It was exactly the same situation as the railroad except the truck rates were less. There is a slight difference, in that less than carload shipments of freight delivered to a railroad cannot be diverted so that we [fol. 1138] did not have the diversion of less than carload shipments by rail.

We devised a method of meeting the situation as shown in Exhibit 420-V. The question did not arise again in South Carolina after we made these announcements and put the recommendations into practice.

Diversions next came up in Texas. On January 16, 1928, we entered into a contract with Texas City which was to continue until February 28, 1929. This contract carried a provision that we would have an additional 6 weeks to dis-

pose of all sugars that might be on hand. During the years 1926 to 1928 we were not actually operating the Texas refinery but were providing raw sugar and selling the output.

I will describe the rate structure in Texas from New Orleans and from the 2 Texas refining points. We had what is known in railroad parlance as "blanket adjustments." The rates from New Orleans to practically the entire State of Texas, commonly known as "Texas Common Point Territory," were one rate. Our rate, just prior to the Institute, from Louisiana to Texas was 67¢ and covered practically the entire State except the Gulf ports, the far western area and the Panhandle area and El Paso. [fol. 1139] The same blanket adjustment was in effect from the Texas refineries. At Texas points the rate was 50¢ per 100 pounds and covered approximately the same area that the blanket rate from Louisiana covered. After 8 years of litigation the Interstate Commerce Commission handed down a decision that completely changed the entire structure of the Southwest and new rates were made effective in July, 1928. Instead of a blanket rate the Commission prescribed a straight mileage basis from Texas points of origin and a zone basis for points outside of Texas. The rate from New Orleans to Dallas was reduced from 67¢ to 58¢. The rate from Sugarland and Texas City was reduced from 50¢ to 38¢. The freight application then changed and the New Orleans rail rate was discontinued. The refiners individually announced that they would sell in Texas on the basis of New Orleans all-rail rate, or the rate from Sugarland, Texas, whichever was lower, plus 17¢ per 100 pounds which was and had been the difference between the New Orleans and Texas rates for many years.

Practically every point in Texas under the railroad tariffs is a transit point. The tariffs simply carry a general transit ruling which is contrary to what is done in other [fol. 1140] sections of the country where they name specific points where the transit privilege is available. Prior to the rate change in July, 1928, the opportunities for transit were not available due to the blanket adjustment. The consumer could transit to his heart's content but it made no difference because the balance of the through rate in each case was the same. The change in the freight structure brought a complete change in that picture.

Defendants' Exhibit Q-4 was received in evidence.

The Hearne case is typical of the others.

There was a possibility of transiting or diverting sugar shipped from the Texas side, if the rate from a Texas refinery to northeastern Texas or southwestern Arkansas was higher than the freight application, which was the New Orleans rail rate or the Federal Barge Line rate, and the rate from the Texas refinery to the points of diversion or transit was the same or fractionally less than the rate at Dallas. At Dallas there was the same opportunity of making this pick-up and defeating the refiner's openly announced ruling freight basis.

[fol. 1141] The situation in Texarkana is an example. There the freight selling basis was predicated on the Federal Barge Line rate of 41¢ and we shipped sugar from Texas City to Texarkana on a freight rate of 50¢. Freight from Texas City to Texarkana, which is approximately the same distance from Texas City as Dallas, could be moved from Texas City via Texarkana and back into Dallas by the payment of but 1¢ additional freight charge. In other words, the additional freight charge did not equal the difference in the selling basis in Texarkana and Dallas. It was just the reverse of the picture which we had on shipments from Louisiana. That situation was also true if Texarkana was on a New Orleans rail rate, though the pick-up was smaller. A similar condition existed in northeast Texas, at points like Cameron.

Rumors of this practice reached us in the fall of 1928 after the freight rate structure was changed in July. We never had any experience in dealing with this type of thing prior to this time and tried to devise some method which would assure our maintenance of our own individual openly announced freight selling bases. We discussed this difficulty at Institute meetings. We tried several remedies. [fol. 1142] One was the same that we tried effectively in South Carolina, namely, having the freight charges prepaid and permitting the customers to deduct from the invoice the amount of freight charges he actually paid, on presentation of the evidence that the car had actually been delivered at that destination.

The South Carolina method did not work because we had difficulty in getting buyers to return the expense bills when they made these diversions and they were then unable to

obtain their allowances and went to someone else. Once or twice it looked as if competitors had shipped these cars to destinations where transiting was possible and that some of the brokers were directly involved in these matters.

In January, 1930, a method was devised that put an end to this diversion, by openly announcing freight billing bases. Transiting and diversion had developed on a wide scale. At one time we thought of permitting all buyers to transit or divert, but if we had continued the practice it would have spread progressively and our whole freight selling basis of the entire States of Oklahoma, Arkansas and Texas would have been completely disrupted. There would have been the greatest disparity between the same [fol. 1143] buyers in the same market predicated on the point where the buyer had taken transit. The buyer's gain under our openly announced freight selling basis would not have been the same at each point of destination but would vary, depending on what point he transited. About that time a refiner reduced the freight applications in Texas to the actual Sugarland rate and other immediately followed. but the Texas transiting situation was not cured. The same opportunities existed under that system as existed before.

Early in 1930 we considered the problem. I went to New Orleans to find out first how I could have sugar transported from New Orleans to Houston by water. I had done the same thing with American sugar from 1923 to 1925 so I knew just how the operation could be handled. I negotiated with the Redwood Line and finally obtained a rate of 17¢ per 100 pounds, the difference which then existed in our selling basis, namely, the Sugarland rate plus 17¢. We had, in addition to the 17¢, many incidental charges, such as handling at New Orleans to the dock. We likewise had warehouse charges and insurance at Houston. I negotiated for the lowest upset rate I could get and 17¢ was as low as the standard lines would go.

[fol. 1144] Our practice was to forward from our Houston stock to all points in Texas, if the 17¢ rate from New Orleans to Houston plus the local rate from Houston to the interior destination did not exceed the through all-rail rate from New Orleans. Our purpose was to stop the forced absorptions, such as we had to take at Houston or Dallas, and the diversions which occasioned the forced absorptions. Our total freight expense on a shipment from New Orleans

to Dallas, handling it via Houston, was 62½¢ as against an all-rail rate from New Orleans of 58¢. The freight application remained at 55¢. By forced absorptions I mean those forced by the fraud or misrepresentation of the purchaser. Each successive step was to prevent purchasers from getting advantage of the Hearne rate at Dallas.

The plan provided that sugars originating in Texas should be shipped to a consignment point or a transit point and those shipped to northeastern Texas, where transiting could be accomplished to defeat the openly announced selling basis, should be made, in every case, from the transit stock.

If sugar has been transited once it cannot be transited a second time under the tariffs.

[fol. 1145] The Texas refiners' sugar could be shipped to northeastern Texas where the freight selling basis was the New Orleans rate and from those points sugar might be transited to points west, such as Dallas and the south. In order to stop that, the plan was adopted providing that the sugars which originated at Sugarland or Texas City should be shipped out of transit stock at Houston.

American adopted these recommendations. They have proved effective.

(Counsel pointed out that the general recommendation on diversion was Code Interpretation 1-D-1 (b) and (c).

Exhibit 281 was a notice sent by American to the trade February 5, 1930, after this recommendation.

The rates were on a mileage basis and progressed as we went forward so that we shipped direct from New Orleans to points in northeast Texas because there was no opportunity to transit there.

The transiting situation arose at Indianapolis.

Defendants' Exhibit R-4 was received in evidence.

We knew that transiting of our sugars was going on at Indianapolis but what I call illegal transiting there first came to my attention in a report made by an Institute representative after investigation of the situation. That was the Chinal investigation of the summer of 1930. The situation [fol. 1146] was the same as in Texas. We had rates in the East that progressed as they went from the points of origin, whereas the rates from the South were blanketed over large areas.

The all-rail rate from Philadelphia to Indianapolis was 50½¢ which was the freight application at Indianapolis. The all-rail rate from New Orleans to Indianapolis was 54¢. From Philadelphia to Lafayette it was 54½¢ and from New Orleans to Lafayette it was 54¢.

Since the New Orleans rate to Indianapolis and Lafayette was the same, no additional charges were made if sugar was transited on New Orleans billing from Indianapolis to Lafayette. On the other hand, it would be necessary to pay 4¢, the difference between the through rate, to transit sugar on eastern billing from Indianapolis to Lafayette.

Accordingly, by substituting New Orleans for Philadelphia billing it was possible to get Philadelphia sugar to Lafayette and achieve a pick-up of 4¢.

The situation led to conferences. I directed that the transit billing on sugars that were shipped to Indianapolis must be registered in the name of American and that no consignment sugars should be handled without the specific [fol. 1147] authority of a direct representative of American and that transited sugar should not be assigned or transferred. Prior to the receipt of the report of this investigation I had not known that our transit billing to Indianapolis was being transferred to our brokers. Our auditors checked up on these various warehouses and had never reported anything of this character to me.

When I issued the instruction to the Central Weighing & Inspection Bureau I not only included Indianapolis, but Detroit, Cleveland and Chicago, and insisted that our transit billing on consigned sugar be registered in our name and that only men whom I designated should be permitted to use that transit billing.

The various reductions in freight applications which have taken place since the formation of the Institute have materially increased the opportunities for transiting or diversion.

Whenever a freight selling basis is less than the all-rail rate, it immediately creates the opportunity to have a car consigned to that point and later diverted to a point beyond where the freight selling basis is an actual rail rate. [fol. 1148] At Buffalo today we were selling on an arbitrary rate, not predicated on any transportation charge, of 15¢ per 100 pounds which is less than the all-water rate from New York. The all-rail rate to Buffalo from New

York, Philadelphia and Baltimore is 37¢. An all-rail shipment from either of these points to Buffalo cost 37¢ and is sold on a 15¢ rate. If the sugar is diverted or transited to a point beyond Buffalo the difference between the all-rail rate to Buffalo and the freight selling basis can be picked up at destinations beyond Buffalo. Buffalo's freight application is below the all-rail rate because of water competition.

Our problem in meeting the transiting-diversion situation has steadily been growing more serious instead of less serious and for the past 4 years it has been very difficult to stop. We have no way of telling the shipment that is to be diverted. On storage-in-transit handlings we can sometimes tell because in the eastern areas specified points are named in the tariffs. The transit points are limited and there would have to be a shipment to such a point.

American has never taken an interest in the diversion of sugar purchased f.o.b. refinery except shipments made to [fol. 1149] itself. Our efforts to stop this transiting and diverting of shipments was not for the purpose of preventing freight absorptions; it was to prevent the so-called forced unannounced absorptions as distinct from those which we had announced we would take.

There have been a material number of reductions in the freight application by refiners' open announcements during the campaign against transiting and diversions. The freight applications in Texas have been materially reduced since our campaign started. Today sugar is sold in Texas on a base price at Houston, Port Arthur, Orange, Corpus Christi, Beaumont and Galveston. In other words, no freight charges are added in selling sugar at any of those points. To the points tributary thereto the freight rates are added in making a freight selling basis so that Texas refiners are absorbing in Texas. That has not changed our efforts against transmitting and diversion to defeat our openly announced freight application.

Freight applications were materially reduced at Charleston, South Carolina, after our efforts there and we are now selling on the base price without the addition of any freight although our efforts to prevent the transiting and [fol. 1150] diversion of shipments has continued.

The freight applications to points in Indiana outside of Indianapolis have been reduced since the transiting and

diversion. Our freight selling basis in Indiana is the Federal Barge Line rate, less 5¢ per 100 pounds, except where we were selling on an arbitrary basis, which is less than any rail rate from any refinery. It is materially lower than when we started our campaign.

In 1929 the actual freight rate from New Orleans to Dallas, Texas, was 58¢ and anybody who shipped a car by rail from New Orleans had to pay 58¢ per 100 pounds. We would have been delighted to sell Dallas f.o.b. New Orleans and allow the purchaser to do anything he wished with the car.

At the time the Charleston case arose no one could bring sugar there for less than 20¢. The all-rail rate from Savannah was 20¢; the water rate from Baltimore was 20¢ and we had the additional cost of moving the sugar from our refinery to the dock at Baltimore. The purchaser's effort gave him a freight application at Charleston of a base price plus 11¢.

In 1929 we would have sold anyone at Lafayette sugar from New Orleans or Philadelphia, except for a very short [fol. 1151] period when we had delivered prices in that area. Delivered prices lasted 6 months in Indiana and had already ended by the time the situation arose there.

American objected to having its shipments transited or diverted because it brought about the defeat of its openly announced selling bases at the destinations to which the shipments were diverted. Our absorptions under our openly announced freight applications varied with different destinations because of the different arbitary rates.

Defendants' Exhibit S-4 was received in evidence.

The clauses headed "Delivery" and "Freight" were in our contracts which have been in effect since 1926 with the exception of the stamped portion on the face which was put on later. Our contracts remained in effect until the fall of 1931 when 2 additional clauses were placed on them. We sent out Exhibit 281 to call to the attention of buyers that we were going to live up to the provisions already in our contract.

I was entirely sincere in my effort to stop this transiting which involved possible violations of the Elkins Act and an indictment which might have cast me out of this business for the rest of my life.

Exhibit 264, New York Central's Tariff governing the privilege at certain points and in effect prior to Boyd's [fol. 1152] Tariff, provided in my opinion, that no sugar could be transited which had not been received over a route to the transit point where the balance of the through rate from the transit point to the ultimate destination was exactly the same as the balance of the through rate on the transit billing which was used.

A railroad must receive, upon the sugar which is actually moved out from the transit points, the same revenue which it would have been entitled to, had the sugar moved directly through the transit point to ultimate destination without being stored in transit. It was my thought that sugar moving from Philadelphia to Indianapolis on the rail rate of 50½¢ could only be transited on the transit billing where the carrier received the difference in rate from Philadelphia to Indianapolis and Philadelphia to Lafayette. In other words, the transit billing on eastern sugar must carry a 4¢ additional charge and that substitution of billing or of that sugar, which would defeat the carrier's obtaining what we would have obtained on the direct shipment from Philadelphia to Lafayette, was an illegal substitution and impaired the integrity of the through rate. I have held these views since I was with the carriers in 1904. [fol. 1153] Under my view it was not permissible to substitute water-borne sugar, D. T. & I. sugar, because the D. T. & I. did not have joint through rates to points beyond Detroit, or local sugars. My interpretation hinges primarily on the article, Item 9 of the old tariff, Exhibit 264, which provides there shall be no substitution which impairs the integrity of the through rate. The first time I ever heard the view that water-borne sugars could be substituted was when Bernstein appeared here. Exhibits 441 and 441-C to 441-J, inclusive, consist of correspondence between Bernstein and myself with the exception of a few letters to certain other railroad officials.

As shown by this correspondence, Bernstein's views did not agree with mine. I did not accept his opinion because I was personally involved in these transactions and his views did not affect my liability under the tariff and I am charged with the responsibility of adopting a tariff governing American's traffic.

The view that I expressed throughout that entire period was my most sincere opinion and the one which I followed in directing American's transportation.

[fol. 1154] A message from our district freight agent at Baltimore first brought to my attention the question of transiting local and water-borne sugar at Detroit. He informed me that he had received a delivery from consignment which indicated the D. T. & I. sugars had been transited from Detroit to Columbus, Ohio. I immediately took it up with Edgar & Son and asked them to give me a full explanation of the transaction. After 2 months of correspondence Beebe was requested to bring the documents to New York to the vice-president in charge of sales. He presented the railroad expense bill which showed that he had transited a shipment of 20,000 pounds to the Kroger Grocery Company in Columbus, Ohio, in American's name.

The rates from the East to Detroit and Columbus were exactly the same. Therefore, no further freight payment was necessary. The shipment moved from Detroit to Columbus, Ohio, without the railroad's earning one single dollar. I pointed out to Beebe that he had transited D. T. & I. sugar which I felt was not subject to the transit privilege and that he had transited 20,000 pounds of a carload when [fol. 1155] the tariff specifically provided that any deficiency under the minimum weight of 40,000 pounds must be paid for at the local rail rate. The Columbus application was the Philadelphia all-rail rate and the Detroit application was the Philadelphia rail-and-lake rate. I demanded that Beebe immediately pay the carriers the charges to which they were properly entitled. He took the expense bill back to Detroit and said that he would.

Next, the Baltimore representative telephoned that he had a D from C, indicating that a water shipment had been transited to Kidd, Dator and Price, Benton Harbor, on rail billing. I immediately reported to the president of our company, who was a former attorney with the I. C. C., and to the vice-president, who was a railroad man, and told them we were in a bad fix on this matter and that I must go to Detroit immediately. I went that afternoon.

I demanded that Edgar & Son produce their records and show me any other case where our billing or our sugar had been involved in transiting of this character. I found on that date 5 cases where water-borne sugar had been

transited and demanded that they immediately set that right. I spoke to Wetherall, traffic manager of Edgar & [fol. 1156] Son, Lamping, his assistant, and Beebe. They said it was a mistake and would be corrected immediately. When I returned to New York I reported the matter to my executives and they addressed a letter to Edgar & Son. I followed up the matter diligently during the next few months and insisted that the proper rates be paid on our sugars.

In my negotiation with railroad officials, leading to the publication of the Boyd Tariff, no railroad man or any one else suggested or indicated to me in any way that water-borne sugar could be substituted for rail sugar at transit points either under the old tariffs or under the new tariffs to be published.

In changing the transit tariffs it was not our purpose to prohibit substitutions, which had been permitted under previous tariffs, but rather to clarify the existing tariffs. The new tariff clearly states that eastern sugar at Indianapolis cannot be substituted and reported on a New Orleans billing and that was my interpretation of the old tariff.

I was fundamentally interested in the use of the transit billing which was in question at Detroit and Indianapolis because American's transit certificate certified that the [fol. 1157] privileges granted were in strict conformity with the railroad tariffs involved.

American followed the Institute's Code Interpretation dealing with transit and diversion because we were opposed to transit and diversion of our shipments to defeat our openly announced selling bases. It was not our practice in following Code Interpretation 1-D-1 (a) to require purchasers to specify, at the time of entering their orders, the precise destination of the sugars so ordered and not deviate from such specifications.

Where special terms were openly announced, such as a guaranty provision, it was our practice to insist that the buyers state whether the sugar was to go into the area where the guaranteed terms were in force. On contracts where such special terms were in force we did not require the purchaser to specify destination until towards the end of the 30-day period as provided in our contract.

We did not require a purchaser not to deviate from the specifications as long as the sugar was going to the specific

area which he had originally selected. If it were guaranty territory we did not permit him to have the protection of the [fol. 1158] guaranty on a shipment which he might designate to go to territory outside of such guaranty territory.

At no time did we prohibit switching from one point in guaranty territory to another point in guaranty territory or from one point in non-guaranty territory to another point in non-guaranty territory. There were times when a buyer would specify a destination where transiting or diversion could be accomplished but he had no place of business there. In those instances we stated that, inasmuch as he had no place of business at that point, we would not ship there and would not accept the order for delivery there. We did not permit a man who gave us an order for delivery in guaranty territory to switch that order into non-guaranty territory since he had protection on the guaranty privilege between the time he placed the order and the time he gave specifications.

In actual practice buyers have frequently changed their destination and we have diverted cars for them, always with the distinct understanding that they would pay our openly announced freight selling basis at the ultimate destination. [fol. 1159] Under the Code Interpretations 1-D and 1-(b)-1 we never refused to permit a change in destination or diversion of the shipment if the buyer was willing to pay the openly announced freight application at the ultimate destination. We traced shipments as provided in Code Interpretations 1-D-1 (c) and (d). We did so to see that we received our openly announced selling applications at the ultimate destinations, to ascertain the date of arrival in order that our cash discount might be properly figured, to find on what date the sugar arrived at warehouses in order that we might know what date the warehouse charges should start, to ascertain when the 4-payment plan payments were due and to find out on what the price guaranteed terms should be applied. There was no other method which I knew of to determine such facts other than by tracing cars.

I participated with the traffic managers of other refiners in the drafting of Code Interpretations contained in the subdivisions 2-1-D-2 commencing with the heading "Recommendations Regarding Transiting." Our principal purpose was to control for our respective companies the transit billing on sugars going to consignment points.

[fol. 1160] Defendants' Exhibit T-4 was received in evidence.

In the clause "In the event that buyers desire to store in transit at any of these points in accordance with the tariff, we will, at buyers' request, ship from our refinery in carload to destination," "destination" means these transit points and "inadequate," in the clause "should our consignment stocks at any of these points be inadequate," means inadequate at the time the order is given to move forward.

American adopted the "buyer's consent" clause set forth in Code Interpretation 1-D-3. Some carriers interpreted Section 15, paragraph 11, of the Interstate Commerce Act differently from others and in order to make it perfectly plain to these carriers we adopted the buyer's consent clause in which the buyer agreed over his signature to permit the carrier to disclose any information in reference to the shipment covered by the invoice.

When we trace a car the customer does not have anything to do with it. We perform the entire service ourselves. We adopted the "change in destination" clause contained in Code Interpretation 1-D-4 because our contracts had always provided that the ultimate freight selling application should [fol. 1161] be charged on the sugar. Some contracts were not as specific as ours. We therefore adopted this clause as a further notice to the trade that we would demand the freight selling application to the actual destination.

Referring to paragraph 26 of the Government's petition, we did not restrict and prevent deliveries to points at which diversions are apt to be made. If a buyer will pay us our openly announced freight selling application at the actual destination involved, a diversion can be made at any point on any railroad prior to the delivery of the car at the first destination on the through rate.

I do not recall that we have ever asked our brokers to secure evidence of transiting or diversion. After we have learned of such transiting or diversion we have taken it up with our brokers to find out whether they are a party to transiting or diversion to defeat our openly announced freight selling applications. I have never seen any request to any of our brokers to make a report to the Institute. So far as I know our company did not go beyond paragraphs 4 and 5 of the broker's pledge contained in Exhibit 202.

[fol. 1162] I cannot recall where any one of our brokers ever gave us any assistance in preventing diversion or transiting. I never heard of brokers "searching diligently."

American has never blacklisted or disqualified any broker, warehouse, jobber, wholesale grocer, or other buyer for participating in any scheme to defeat its freight application. I do not know of any case where any other refiner has done so.

Prior to the adoption of Code Interpretations 1-C-3 and (b) and (c) in February 1929, rumors came to my attention with reference to rebating by water carriers who were using the New York Barge Canal. These operators are subject to no regulatory authority. The Institute furnished reports on private charters under the second Interpretation. I received them, inspected them closely to see whether I was getting as low rates as my competitors and further to see whether my competitors were paying higher rates which might open the possibility of the water carriers' rebating to some consignee, broker or other person.

Prior to the adoption of Code Interpretations 12-1-A and [fol. 1163] B, there had been a recurrence of such rumors.

I was at the meeting referred to in Exhibit 316, "Memorandum of Proceedings at Meeting of Water Carriers, March 7, 1930." I stated that I believed these water carriers had a place in the transportation system; that I did not want them to get into the position the railroads of this country were in in the early days, namely, of openly rebating and other practices, which finally brought a national regulatory law which I thought at this time was too rigid; and that they had better clean house before there was a rigid regulation which would put them in a straight-jacket that the railroads were now in. I stated that they were properly entitled to a reasonable return which American was prepared to give them. I reiterated a number of times that I was speaking only for American, as the minutes of the meeting indicate. I said that I thought they were very foolish to start into the rebating practice and that it would ultimately end in disaster.

It was stated at the meeting that different terms must necessarily be applied by the different lines predicated on the character of freight service. The canal operators then quoted rates, terms and conditions under which they could [fol. 1164] transport sugar. They changed these rates,

terms and conditions from time to time. It was not stated by anyone at the meeting that, after announcing their rates and terms, they could not change them. American only asked operators with whom it was doing business to report changes in rates and terms. American never refused to do business with any carrier because of any Institute recommendation. We never discussed with any other refiners the subject of refusing to do business with any water carrier.

I have not done business with the Transmarine Line in recent years because I had what I considered the most efficient, honest, able operator on the New York Canal and I preferred to do business with him. Further, I had great difficulty, due to a receivership of the Transmarine Line, in collecting outstanding claims. I still have small amounts outstanding by reason of that receivership.

Prior to the Institute the motor truck was not used extensively except for metropolitan deliveries. The situation has changed materially because motor truck lines are springing up throughout the country. Between 30% and 40% of the eastern refineries' business is transported by [fol. 1165] motor trucks for hauls as long as 300 to 400 miles. There are a great many so-called fly-by-night truck operators who come into us, having brought goods from a midwestern point to a metropolitan city, such as Baltimore, Philadelphia or New York, and offer to transport our goods from those points back to the general direction of home at prices which we can practically fix ourselves. It is a back haul business and all they wish to get is the price of the gas and a little profit. These truck operators are not subject to I. C. C. regulation.

We had difficulty with truckmen. We found the same situation was arising at Tampa, Florida, that I described at Charleston, South Carolina.

American secured non-rebating agreements from its truckmen. I notify the Institute when such non-rebating agreements had been signed by the trucking companies which we used. We received from the Institute pink sheets for the freight book showing the names of truckmen who have signed non-rebating agreements. We do not restrict our truckmen to those shown on such lists. The lists change frequently. Every time I employ a new truck service and a non-rebating agreement is signed, I so notify the Institute and the name of that truckman appears on the next

[fol. 1166] pink sheet. I do not know that American has ever refused to do business or stopped doing business with any trucking concern because of any Institute recommendation, with the exception of one case where a truckman declined to sign the non-rebating agreement. I said I would get another one and a week later he came in and said it was all a misunderstanding and signed.

I do not know of any Institute recommendation dealing with the practices of the railroads or the water lines subject to the I. C. C.'s regulation. There was no Institute recommendation ever made regarding any other carriers.

I had many conferences with Dever of the C. A. T. Line. He solicited business from me for many years. I recall a conference with him in the summer of 1929 when he advanced claims to better transit time. I was much surprised that the transit time by the C. A. T. Line was between 7½ and 8½ days to Chicago and asked him to support that with some evidence. He did. I immediately reported to the president of our company, informing him that the service was better than it had been in the past so far as time was concerned.

[fol. 1167] Our shipments over the C. A. T. decreased from 44,400 in 1930 to 3,600 in 1931 because our freight selling applications had dropped to the lowest level that we have ever had and we naturally sought the lowest rate routes, which were all-water from New York and Federal Barge Line from Louisiana. Our shipments from the New Orleans refinery to the territory served by the C. A. T. Line increased relatively as against our eastern refinery. We cannot ship by the C. A. T. Line from New Orleans.

C. A. T. Line's shipments were not guaranteed in 1927, 1928 and 1929 but they were in 1930. As far as I know, the guaranty did not affect our shipments.

No representative of the Institute ever had any conversation with me about whether I should ship by the C. A. T. Line. We determined the amount we would ship or not ship by that line or any other carrier by our inventory and by the transportation rates we had to pay.

Late in the summer of 1929 I suggested to Dever that he talk to the Institute about his service. I told him that perhaps Judge Ballou might be interested in this since he was always interested in anything pertaining to transportation. I could not do anything as the president of our company

had to decide whether the company would guarantee sales [fol. 1168] in territory served by the C. A. T. Line. I had nothing to do with the terms of the guaranty or the territory to which that applied.

American withdrew its delivered prices in Kentucky in May 1930. Since that time I would have been delighted to sell f. o. b. our Chalmette refinery for delivery to the American Barge Line. I would have also been delighted if a customer would have taken all-rail deliveries at New Orleans or by Government barge or any other method that existed. Any statement by American's broker at Louisville to Altscheller to the effect that we would not ship was erroneous if made.

A Louisville purchaser who bought f. o. b. from our New Orleans refinery and shipped via the American Barge Line had practical difficulties. This Line required us to load a minimum of 200 tons before it would place a barge at our New Orleans refinery. Its tariff, filed with the I. C. C., specifically provides in Item 540 that neither switching nor drayage absorptions will be made on sugar when originating at Three Oaks, St. Bernard's Parish, Louisiana, where our refinery is located. The purchaser had to take that quantity in order to deliver to the boat at our refinery. [fol. 1169] Otherwise he would have to pay the switching charges from the refinery to the City of New Orleans and absorb dockage, wharfage and such other incidental charges at New Orleans proper. His total expense would have been greater than our freight selling basis.

A question arose since the Institute as to what constituted C. F. A. territory (Exhibit 244). There is an area in West Virginia where the carriers have 2 sets of tariffs carrying class rates from North Atlantic points. The official tariff published by the Trunk Line Association carries all points in the C. F. A. territory. For this particular area, the individual carriers published tariffs that carry rates to points intermediate to this territory and likewise carry the same rates as the C. F. A. territory carried. The question arose by reason of someone's stating that the announcement of American, specifying it would sell in C. F. A. territory on the Philadelphia rate, was not being carried out or was not being met by other refiners.

We always declined to sell f. o. b. our Baltimore refinery for deliveries at Norfolk and have continued that policy.

We had 2 standard lines operating on Chesapeake Bay. [fol. 1170] There were 1 or 2 small steamers which operated between Baltimore and Norfolk, not capable of hand-ing all of the traffic. If we had permitted f. o. b. sales at Baltimore and a few pounds of sugar reached the Norfolk market at less than our openly announced freight selling application, it would have meant we would had to go down to that basis and absorb from the rate which we would have had to pay by these standard lines. Neither the Institute nor any competitor told us to follow that policy.

I have looked up our records relating to the situation at Sault Sainte Marie, referred to in Exhibit 457-D-5, and find our freight selling basis, effective at that time, was 49½¢, the Philadelphia lake-and-rail rate. On our sellers' ruling freight list we carried a clause reading:

"The price basis is computed by using to the upper peninsula of Michigan (guaranteed territory) the Philadelphia rail and lake or the Philadelphia all-rail, whichever is lower, but the sugar must actually move all rail to get the benefit of the guarantee. To lower Michigan (non-guaranteed territory) we use the Philadelphia all-rail route."

The customer's position was that he had a 49½¢ rate whether he took all-rail or lake-and-rail service, but the guaranty only if he took the all-rail service. The all-rail service was the fastest. In other words, we, the refiner, living up to our openly announced freight selling basis, [fol. 1171] actually insisted that this car move via the all-rail rate, taking 66¢ per 100 pounds from New York, Philadelphia or Baltimore, although we could have moved it by the rail-and-lake routing at 49½¢, with the service perhaps 1 or 2 days slower. I do not know of any ruling of the Institute that would bear on this matter or such as was indicated in Monet's statement.

Exhibit 457-D-4 is a letter from Stone of Spreckels to Worcester of Revere written August 29.

My records indicate that April 1, 1929 National announced it would make shipments to customers at Hartford via an all-rail route, where the rate was 21½¢, and invoice the customers on the basis of the water rate which at that time was 19¢. Prior to this time the freight appli-

cation in Hartford had been the rail rate on rail shipments and the barge rate on barge shipments. The rail rate was 21½¢ and the boat rate 19¢; dock to dock. The rail rate from New York and Boston was the same. Revere met this competition on April 2, Spreckels on April 3 and American on April 4. The next action was May 15, 1929. Arbuckle met the basis just stated but said the 19¢ rate was applicable irrespective of routing and superseded their quotation which had previously been f. o. b. New York. The [fol. 1172] next announcement was made by Spreckels on May 17, 1929, announcing a delivered price of 19¢. This was met by Arbuckle on May 24 and by Pennsylvania on June 12. American took no action. By the next announcement which was made June 20 we endeavored to place a number of Long Island Sound and Hudson River points on a basis of actual cost to the refiner. We announced we would make the delivered price at Hartford 21½¢. No one followed so we postponed it. It never went into effect. The water rate was made 18¢ on June 29, dock to dock, but no change was made in the freight application. On August 23 Revere announced a delivered price of 18¢ which was followed by National on August 27. National did not announce a delivered price and there was no reason for its being announced because nobody could get any sugar by these routes from New York to Hartford at less th[illegible]

So far as I know there was no conference such as [illegible] mentioned in this letter as a conference with "our two largest competitors". I did not attend it. I never heard of the suggestion by Stone to Worcester, prior to the letter being offered in evidence.

Questions arose about Savannah's use of the Port Wentworth rates. Under the southeastern rate decision the [fol. 1173] I. C. C. prescribed mileage rates in the Southeast instead of the basing point system. There were large areas where the blanket rate applied. Prior to this decision the rates from Port Wentworth and Savannah were the same. They were called the blanket rates and referred to as the Savannah rate. Under this decision there were a few points where, on account of the additional mileage from Port Wentworth to Savannah, the rate broke on the zone and the Port Wentworth rate was 1¢ or 2¢ higher than the rate from Savannah.

Savannah was shipping from Port Wentworth because their refinery is located at that point and not Savannah,

which is 7 miles up the river. The Savannah refinery enjoyed the lowest rate in this territory which we are talking about. American was selling at the lowest all-rail rate of a refinery of a competitor and was meeting Savannah. We did not immediately, when this change of rates took place in 1928, know that this situation had developed as between Savannah and Port Wentworth rates. It came up later.

There are 3 mistakes in Exhibit 457-C-1. Twice he shows "Fort Wentworth" and it is "Port Wentworth" and it is obvious that "New Orleans" should be "Savannah". [fol. 1174] Abbott sent me a letter which he received from Judge Ballou in reference to the Hedger matter. I read the letter but paid no attention to it because Hedger, prior to 1928, carried commodities like sulphur. I had no intention of using his service either before or after the Institute.

Cross-examination.

By Mr. Fly:

I went to Detroit after receiving information of illegal transiting. Buffalo, Toledo, Chicago and Milwaukee were also places where transit manipulations might have taken place at that time, but I did not go to those points. I instructed the Inspection Bureau the way I wanted American's transit billing handled.

When the Edgar & Son situation arose I took away from all the warehouses the privilege of transiting our sugar and put around the whole operation, restrictions which I thought would tighten it up to such a degree that it could not happen. When I found out what was going on in Detroit I reported it to Stubbs immediately and talked to him constantly about it. I gave my personal attention to the situation at all times as it was a serious matter with me.

There have been a few isolated exceptions where freight applications have gone up, but the trend has been down- [fol. 1175] ward except during the era of delivered prices. Delivered prices in one area in the Middle West from April, 1929, to May, 1931, and the Alabama, Tennessee, Kentucky and Indiana area from December, 1929, to May, 1930, caused the freight applications to rise. I do not know of any important exceptions offhand.

If there is a higher freight rate from one point of origin to a particular area than another refiner has to the same

area, the man with the higher freight rate has to absorb down to meet the freight application that prevails, namely, that of the refiner with the lower rate.

In January, 1930, the actual rate from both Savannah and New Orleans to Nashville was 46¢. Delivered prices were in effect at that time so the freight application was the same. The rate from Baltimore was 88¢. The barge rate to some points was less than the all-rail rate during the period of delivered prices only. The barge rate of a more distant refinery going into the market was lower than the all-rail application of the lowest refinery.

American shipped by barge, stored in transit and had some expense, but our general cost of doing business, that is, absorptions during pick-ups, has shown a loss in all [fol. 1176] years. In each year, our absorptions, due to our storing in transit, damaged sugar and concealed damages which could not be collected from the carriers, have exceeded pick-ups.

During the period of delivered prices the application to Birmingham was 37¢, the New Orleans rail rate. The Savannah all-rail rate at that time was 41¢ and the Federal Barge Line rate from New Orleans 30¢. During delivered prices we sold at the New Orleans all-rail rate which was the lowest. We did not move most of our sugar into that territory by barge during the period of delivered prices because our trade in most instances demanded that we ship via all-rail. They were paying for all-rail service and insisted on all-rail service.

We had some consigned stock at Birmingport, Alabama, which is the transfer point to barge. We endeavored to serve those markets out of transit stocks wherever we could. We had the further disadvantage of having to guess the assortment which our trade was going to take and we frequently found we had to replenish certain grades of stock at those transit points and the replenishment had to be by all-rail shipments.

During that time sugar traffic was not diverted from the [fol. 1177] waterways to the railways. We endeavored to make something by handling sugar by water but we handled the big majority of the business via the rail lines except consigned stocks. We likewise endeavored in those cases to forward as much as we could out of Birmingport stock in order to reduce our loss. During the era of deliv-

ered prices we were endeavoring to pick up as much as we could. The volume of sugar which moved by rail increased fractionally at the time of the adoption of the all-rail application but the amount was not material. We tried our best to ship as much by water as we could. We materially reduced serious losses which we had when we absorbed the difference between the all-rail and barge rate.

Delivered prices were decided upon by Abbott, president of American, without consulting me.

As shown in Exhibit 61-C the through rate from New Orleans to Fort Worth via Houston is 58¢. If sugar were diverted at Houston to Fort Worth the balance of the through rate which had to be paid to get the sugar from Houston to Fort Worth was 11¢. If the sugar was not transited it cost the purchaser either the freight selling application at Houston or the openly announced freight selling [fol. 1178] application at Fort Worth. At that time the application at Fort Worth was 55¢, the Sugarland rate plus 17¢. We were selling in Houston on the basis of 29¢ but actually paying 47¢ from New Orleans; 29¢ was determined by taking the rate from Sugarland to Houston, which was 12¢, and adding the historical 17¢ spread which had prevailed in Texas since 1922. We prepaid 47¢ on sugar which was shipped from New Orleans. The freight application at Houston was 29¢ so that we had an actual absorption when we sold in Houston of 18¢ per 100 pounds. If the buyer transited or diverted the car from Houston to Fort Worth he had to pay the difference between what we had already paid, namely 47¢, and 58¢, or 11¢, so that it would have the effect of giving him a freight application at Fort Worth of 40¢ per 100 pounds. The freight application at Houston at this time was 29¢ per 100 pounds and the freight application at Fort Worth was an arbitrary basis of 55¢. There was accordingly a difference of 26¢ per 100 pounds. The difference between the actual rates from New Orleans to Houston and from New Orleans to Fort Worth was 11¢. The 15¢ which the purchaser saved by transiting that sugar does not represent the artificial difference between our [fol. 1179] freight application and our actual rates.

For competitive reasons we sold at Houston on that basis and we took an absorption of the difference between 47¢ per 100, which we actually paid the railroad, and the freight selling application of 29¢. We did not want to take the

same measure on absorption in cents per 100 pounds at Fort Worth for competitive reasons and we individually made an open announcement of our freight application. It was determined in our own company and we decided that we wished to sell in Fort Worth on the basis of the Sugarland rate plus 17¢, which was 55¢.

The customers at Fort Worth and Dallas were trying to force us to take the same absorptions which we were taking at Houston and we did not care to do this.

We had numerous meetings dealing with transit absorptions in Texas. At Hearne it was simply an effort on the part of the customers to defeat our openly announced freight selling basis at destination by giving a fictitious original destination. The same thing occurred at other points in Texas. We took up with our competitors the question of steps we should take to correct the so-called transit [fol. 1180] abuses in order that our openly announced bases might be maintained. I was interested in seeing that American's openly announced freight selling applications were maintained. I made the suggestion to our competitors because they were having the same difficulty and were likewise endeavoring to have their openly announced selling bases maintained. If it had gone unrestricted it would have spread throughout the United States with the inevitable result that we would all have been selling transportation at no cost to the buyer. The basis price would apply to all destinations throughout the United States. It would also have disrupted the competitive situation which existed among customers at the individual destinations.

If a jobber transited at Houston to Dallas he obtained a pick-up below our openly announced freight application. A competitor who transited at Hearne to Fort Worth obtained a pick-up which was less than that obtained at Houston and the Fort Worth man, upon discovering that he was losing his trade to the Dallas jobber, investigated and found he could also transit at Houston and make a still further pick-up. In that manner the practice spread over the entire area.

Transiting by one individual at one point was followed by transiting by another with the result that none of the [fol. 1181] buyers knew what their competitors were doing. The same freight rates would not make their relative positions the same. There is only one real solution

and that is to establish a basis price at every point in the United States and make a buyer close to the primary market pay the cost of transportation to the more distant points.

American generally tried to comply with the various provisions of the Code and resolutions except when it gave specific notice to the contrary. It gave notice that it would not follow Code provision 3(c). Abbott determined that he wanted to establish delivered prices and that was tantamount to saying that Code provision 3(c) was not acceptable to American.

As a result of the Chicago meeting dealing with the Texas problem an arrangement was made to report to the Institute concerns that had transited in the manner I have described but I had nothing whatsoever to do with that.

I do not recall that Murphy, a salesman of ours at Chicago, represented me at any meeting on transit matters. The mimeographed minutes of the meeting, Exhibit 459-O, show that he was present but not representing me. He was probably an observer representing my company but he had no authority whatsoever.

Petitioner's Exhibits 468 and 469 were received in evidence.

[fol. 1182] All the Louisiana refiners who wished to continue to do business in Texas adopted the plan of moving sugar from New Orleans by barge to Houston. Some, like Godchaux, do it on a very small scale. There were only 2 companies operating directly between New Orleans and Houston.

In using the boat line I did not increase our expense in getting sugar there. I broke about even. It cost a little more to Dallas and Fort Worth and a little less on business to Houston. We suffered a loss in northern Texas and made some gain in southern Texas. I also had to take into consideration that with a bi-monthly sailing I could never guess the grades and so that a very material volume was moved by the all-rail route to Houston at 47¢ in order to fill out shipments from Houston into interior Texas.

If one customer at Dallas transited and defeated our selling basis it put him at an undue advantage against our honest customers at Dallas who did not transit. Our loss on those deliveries at Dallas is roughly 2¢, 3¢ or 4¢ a bag,

depending upon what our warehouse charges are on the various packages. They fluctuated and it depended on how long we had to keep the sugar in consignment. Our losses were less on sugar that went directly through without any warehousing. I did not make the calculation of the saving made by avoiding transiting at Dallas and Fort Worth [fol. 1183] because I did not know what the volume of the transiting was.

The question of absorbing switching charges first arose in Chicago. There the freight tariffs carrying the rates from Louisiana to Chicago provided that free switching would be accorded on all shipments that were stored in the Chicago warehouse for the period of one year. The eastern tariffs did not carry a similar provision with the result that the eastern refiners absorbed the switching in order to meet competition from the South. Switching was governed by the general Code provision that we should not render service to a customer without receiving compensation. We were trying to obtain from the customer the cost of the switching. Where we had competitive situations that necessitated the absorption of switching charges, we announced it.

At other points where Code provisions provided we should be compensated for out-of-pocket costs, we endeavored to get the customer to pay for that service. We discussed the situation at each of these points and the technical interpretations of the tariffs. The tariffs generally provided that in the case of sugar moving from Texas or California, switching should be absorbed by the carrier-[fol. 1184] performing the line haul. In the East it was different.

In investigating the situation which existed at Detroit on January 2, 1930, I found that the refiners had openly announced their intention of absorbing switching charges. Anybody who wished to deliver sugars out of consignment stock likewise had to absorb switching to meet competition. As far as American was concerned, we were trying to be compensated for out-of-pocket expense for deliveries from consignment. We had already paid the storage warehouse charges and did not want to absorb switching also.

The Institute committee accomplished nothing and everybody continued to absorb the switching.

I recall that a committee of the Institute of which I was a member dealt with the question of switching charges. I

outlined the situation where the switching absorption should not be made under the Code clause.

In regard to the Alabama rate situation which arose in April, 1928, Savannah complained to Judge Ballou they could not operate in Alabama under Code provision 3(c) and that as long as the Louisiana refiners had an advantage of the differential route they took the position that they must announce a differential rate on all-rail shipments from Savannah. The question arose 3 months after the formation of the Institute and Judge Ballou felt it was an [fol. 1185] important one. American had the advantage of the differential route and was perfectly satisfied.

All of Judge Ballou's efforts behind the attempted enforcement of Code provision 3 (c) were totally unsuccessful. There was a breakdown in each case. Judge Ballou had nothing to do with the adoption of delivered prices. Our president decided what he wanted to do and went ahead and did it.

The Institute did not suggest the freight rates that refiners should apply. Exhibit 457-I-1 shows that White asked the Institute what the openly announced selling price was at Pensacola. They told him, whereupon Taylor wrote to Bass and told him that American was paying that basis and asked Bass if he was going to break it down to some other basis.

It was foolish for our company to handle sugar from Baltimore on a bi-monthly service where they had to make delivery on the steamship at some periods and assume the insurance charge in addition when we had adjacent to Pensacola a very good service. White decided we were going to sell on the New Orleans basis.

Exhibits 457-X-4 and 457-Y-4 refer to the announcements of the individual refiners which Fisher sent out in the loose-[fol. 1186] leaf book. Henderson found that in one of these supplements Fisher had misinterpreted the individual announcement of an interested refiner. Henderson called it to the attention of the Institute and Fisher said he would correct the misinterpretation on the next sheet and have it appear as the actual openly announced basis of the interested refiner. It is a purely technical routine matter.

Exhibit 457-Q is a letter dated May 4, 1928. The Code Interpretation was in front of Judge Ballou and he was trying to carry out the Code principles. If we were going to

try to fix freight rates, we certainly would not have put in these picayunish things.

Petitioner's Exhibit 470 was received in evidence.

When the Institute was formed Judge Ballou made up statistics on the movement of sugar by barge for the purposes set forth under 3 (c) of the Code. Shipments were reported by states because it was necessary to designate some area.

Delivered prices were an entire and absolute violation of the Code principle. Our company determined it did not [fol. 1187] wish to live up to 3 (c) and so announced that it would establish delivered prices. The primary purpose of 3 (c) was to see that freight was not sold below cost. The amount we picked up while delivered prices were in effect was almost insignificant.

There was a considerable amount of sugar delivered at cost. So far as it was sold at cost it did not impinge on 3 (c). It is only when we were shipping some sugars by differential routes and charging the customer the all-rail basis or vice versa that absorption came in. Provision 3 (c) did not prevent pick-ups.

Prior to the Institute we did not ship to Houston by barge except during the period around 1923 and 1924 when we used our ships. We usually shipped all-rail from our New Orleans refinery at the all-rail rate. During the period when we shipped by water to Houston our costs were greater. Our main purpose was to give service. We were competing against 2 Texas refiners who had over-night rail service from their refineries to the chief jobbing centers in Texas. If we shipped by rail to New Orleans it took 1½ to 2 days. We shipped full cargoes between 4,500 and 7,000 tons in our own ships before we had a consignment point at Houston.

[fol. 1188] At the opening of navigation in the spring the freight selling application at the port cities of Detroit, Cleveland, Chicago and Milwaukee, which during the winter were on an all-rail basis, broke down to the rail-and-lake rate from Philadelphia and continued until December 1.

Our losses on freight absorptions the first 5 months of 1932 were around $160,000. In 1930 American absorbed $109,910.01.

In May 1931 delivered prices were abandoned by reason of Arbuckle's announcement that they were going to sell in

Chicago on a rate which was approximately the water rate from New York. Everybody followed immediately. At that time the application was 35¢, which was what we called the "motor ship rate" to Chicago. Before the rate broke to 35¢, the rate was the Philadelphia rail-and-lake rate of 49½¢. The rate from Sugarland to Fort Worth was 47¢. On January 3, 1930, C. & H. announced that they would invoice all business which they had booked on December 17 on the basis of the Sugarland rate of 47¢. The announcement carried the further provision that that basis would not apply on business taken after December 17. It was practically a price decline.

[fol. 1189] On May 8, 1930, an announcement was made that effective May 6 the Sugarland rate plus 10¢ would be the freight selling application in Texas except where the rate from New Orleans was lower, in which case the lower rate would govern. On December 21, 1930, an announcement was made that the Sugarland rate would apply. That announcement was followed by all refiners selling in that area. On December 31, 1931, we added the 2¢ charge which was brought about by the "Fifteen Per Cent. Case" in which the I. C. C. added 2¢ to all rates of 20¢ or over. On January 16, 1932, an announcement was made that the Sugarland or the Houston rate, whichever was lower, would govern. Since that time, a basis price has been announced for Beaumont, Orange, Port Arthur and Corpus Christi, and the rates which apply from those points govern sales where such rates are lower than from any other point.

My record indicates that on June 20, 1929, American announced a freight selling application of 22¢ at Charleston, South Carolina, for the purpose of trying to sell in that market on the basis of what it actually cost us to get the sugar from Baltimore, namely, the water dock-to-dock rate plus the lighterage. No one followed and on June 24 we [fol. 1190] were forced to go back to the dock-to-dock rate and absorb the lighterage. On August 9, 1931, the freight application at Charleston was made 14¢.

It now costs Savannah 22¢, the all-rail rate from Savannah to Charleston. There is a privately operated boat that goes from Savannah to Charleston once in a while. The Savannah refinery very recently purchased a small craft which makes deliveries at those port cities in order to save

themselves the cost of transportation. Those points are now broken down to the base price.

Revere does not get into the New York City market. National and Pennsylvania are the severest kind of competitors in Baltimore. They absorb the entire cost of carrying sugar to that point. That condition has existed since the time we started our Baltimore operations. New York refiners likewise sell in Philadelphia. They do not to my knowledge sell in Boston. Any time that New York refiners sell in Philadelphia they have to absorb the freight.

There was an arbitrary rate of 21½¢ to Pensacola from dock to dock by the Bull Line. It cost us lighterage to [fol. 1191] get from the refinery to the Pensacola dock. One shipment went there from Baltimore and White was asked what our freight application was and he stated it was the New Orleans rate. We maintained the New Orleans rate for 7 days after this letter was written. In other words, the rate broke down to the Baltimore rate of 21½¢ on July 9, 1928, and we then sold transportation at less than cost.

The freight selling application at Pensacola prior to the Institute was 26¢ per 100 pounds which was the New Orleans carload rate charged by the Mississippi-Warrior Line. I cannot recall definitely what competition caused that, but in my opinion it was off-shore sugars. In other words, refined sugars coming in direct from Cuba were distributed either from Mobile or New Orleans.

The first and most important disability of the differential routes is trans-shipment; second, time; and, third, with some of the unregulated services, financial responsibility. In the time element I include the possibility of price decline. On a rising market the customer would actually get advantage of the rise. With a steadily declining market, such as we have had, that element did not come in during the period under discussion.

[fol. 1192] When a refiner determines he wishes to make a change in the freight selling application or a change in the terms, the Institute's reporting system simply provides that he write out such change, place it on his bulletin board and send a copy of the notice to the Institute. The Institute promptly relays to all interested refiners that information, which was later put in a loose-leaf book as a

resume of the announcements of all the refiners compiled state by state.

There is a Code provision that we notify the Institute when we make a change in our freight selling application and I understand that it is relayed the same way as price announcements and in the same manner. Prior to the Institute we used to get word about our competitors' changes in freight applications from street gossip. The changes prior to the Institute were very very few and were only made when there were revisions of the carriers' freight rates. Our only change in the method was that the same messenger who put the notice on our bulletin board take the message by hand to the Institute. The operation was handled by the sales department. I have noted it in several cases but I have nothing to do with the distribution of these notices.

[fol. 1193] Generally there were no f. o. b. shipments New Orleans refinery. We declined to sell f. o. b. New Orleans for shipment via the Tosca Line to Houston prior to the Institute. Our docks were cluttered up with raw sugar ships and we did not have berthing space for these people. The line was irresponsible. We had no general rule against selling f. o. b. but we had specific applications at our individual refineries. Our general policy in most instances was to sell f. o. b. except at Baltimore which was the general exception and when we were operating Texas City we would not sell f. o. b. Texas City.

Our freight selling application in Buffalo today is 15¢. Our trouble in the general vicinity of Buffalo is that the Buffalo buyer, having the advantage of the 15¢ application, can by the use of trucks truck in to the interior and take away business from the interior buyer who sells on an actual rail rate, the only rate available to him because the canal does not reach the interior points. It would not be available to him unless he was able to ship in 500-ton lots from New York to Buffalo by canal and then distribute those 500-ton loads by truck into the interior. By the use of these larger quantities we were able to get the canal [fol. 1194] boats to go from New York to Buffalo at very low rates. In instances where we have found that a Buffalo buyer with a 10¢ freight application has trucked 10 to 40 miles into the interior and taken the market away from the local man who does not have the advantage of water

transportation, we have been forced to cut the freight application at the interior point so that the local man can continue in business and serve the markets which he has previously served. Our actual freight rates in that area are in the neighborhood of 36¢ and 37¢ and we are selling the interior buyers generally on the basis of 15¢ to Buffalo plus the lowest trucking rate that anybody has ever enjoyed from Buffalo to those markets. The application is in the neighborhood of 22¢ and we are absorbing approximately 14¢ per 100 pounds. The minute we do that in western New York we discover immediately that the jobber just across the Pennsylvania line finds that he is having his markets disturbed by reason of this man jobbing into his market with the result that the Pennsylvania structure breaks down. That is what we have in Pennsylvania, Ohio and Michigan today. It has been continuous reduc- [fol. 1195] tion, first, at one point and then another. It is like loosening a flood gate and immediately your flood goes out and spreads all over the whole place. The flood enveloped us immediately after the low selling application went into effect in Buffalo.

I had three conversations with Dever and I think I had some with Adams too. He is a very persistent young man and actively interested in his company. One of the easy things for me to do was to tell him to go over and talk with Judge Ballou. He had been to see me two or three times and I finally told him I could not talk about the matter as I had nothing to do with it and that Abbott was the man who decided whether we should have guaranteed prices. I told him to go over and tell Judge Ballou about his service and that he might be interested in disseminating the information to other members of the Institute.

Prior to the Institute, American traced cars whenever we though it necessary. We did not have as elaborate a system as we did subsequent to the Institute because at that time our terms of payment were very liberal and it was in the nature of a concession to permit a man to take extra time. We did not have the transiting and diversion problems prior to the Institute because the customers during that period [fol. 1196] were receiving concessions and did not have to manipulate shipments. Furthermore, the rate structure was such that it was not readily possible. However, the problem was prevalent in the West.

I was a member of the Institute committee which arranged the car tracing system and had a great deal to do with drawing up the form. I was opposed to a periodical audit by a concern to be retained by the Institute and said it was unworkable from the start. I reported to my president that I did not think it was a workable plan and it never went into effect.

Petitioner's Exhibit 471 was received in evidence.

The position of our company was, and our counsel had given us the opinion, that the buyers' consent clause was not necessary under Section 15, paragraph 11. We could obtain that information legally. On the change of destination clause, our position was the same. We felt that our contract provided that the buyer would pay for the freight selling application at ultimate destination. The destination clause just emphasized the provision of our contract.

[fol. 1197] Redirect examination.

By Mr. Browning:

No zoning plan was ever adopted by the sugar industry, as far as I know, either before or after the Institute. No such plan as referred to in Exhibit 470 was ever discussed with me. I do not know of any action ever being taken which could be described by those words.

I do not mean by any of my testimony to state that I ever sent our freight announcements to the Institute before I communicated them to the trade.

Referring to Exhibit 471 the Institute made investigations of transiting at Texas, but I do not know anything they did beside investigating.

[fol. 1198] Fred G. Taylor was called as a witness on behalf of defendants.

Direct examination.

By Mr. Browning:

I am executive vice-secretary of the Institute and have held that position since late in May, 1928. Up to the time of Judge Ballou's death on November 3, 1929, I was second in command. Upon his death I became the chief administrative officer of the Institute and have been such ever since.

I was in active charge of the Institute's operations and familiar with Judge Ballou's transportation principle as set forth in clause 3 (c) in the Code. I took only an incidental part in the Code activities regarding transportation. My assignment to other important duties in the middle of 1928 continued until Judge Ballou's death. I had charge of the advertising campaigns of the Institute, attended all meetings and kept in general touch with the work.

I was aware of what the Institute was doing in connection with its transportation policy during the period up to the Judge's death. I did nothing in connection with this transportation policy after I took over command of the Institute, and made no active effort to enforce the principle after he [fol. 1199] passed away. I had observed in such instances where we had sought to sustain this principle that we had utterly failed. We had lost every battle and I realized that the Judge was greatly discouraged in the last days of his life with our results. Therefore, I felt absolutely powerless to do anything and made no effort in its behalf. Section 4, page 1, paragraph 1, of the Code Interpretations covering differential routes was rescinded September 25, 1930, but as a matter of fact it had become obsolete months before that time and I considered that we had abandoned the principle of Code clause 3 (c) as embodied in the Code itself.

During Judge Ballou's lifetime the Institute merely urged the economic desirability of following the transportation principle, leaving to the individual refiner himself what he wished to do in the matter. The members violated the principle continuously.

I had been engaged in the beet sugar business since 1898, first, as a manufacturer and, later, as general manager of the Amalgamated Sugar Company operating in the mountain regions of Utah and Idaho. I resigned in 1921 and started in the brokerage business for myself, representing various beet sugar companies in that area and distributing sugar in the four mountain states. I was in Washington during the war as a so-called "dollar-a-year" man in the Hoover organization in charge of the Sugar Division of the [fol. 1200] Food Administration. After the war I returned to Amalgamated. In April, 1928, I was asked by Judge Ballou to accept a position with the Institute.

The Institute has continued to circulate to its list of members and others the freight announcements that are

made from time to time. In addition, it has supplied transportation statistics and kept a freight book. It has also continued its inquiry and information service. I have no activities other than relaying of announcements, the freight book, statistical information and handling inquiries.

The subject of delivered prices was taken up with the Institute in June, 1928. Some one had suggested the desirability of selling sugar on a delivered price basis, pointing out that a great part of the sugar of the country, particularly that of the beet sugar producers, was sold on that basis, and that the beet producers seemed to have less trouble with various problems of distribution than the cane refiners. The discussion was brief and Judge Ballou raised the question of whether such action was legal and said that he would look into the matter. He was instructed to refer it to counsel for an opinion. Exhibit V-4 is the opinion which we received. After its receipt we dropped [fol. 1201] the matter and have never referred to it since.

Defendants' Exhibit V-4 was received in evidence.

I have not heard of further discussions of delivered prices at the Institute, in or out of meetings.

The possibility of freight applications based upon a system of freight zones was discussed at a directors' meeting on November 6, 1928. Judge Ballou advised me he thought the question fell into the same category as delivered prices, that we would have no legal privilege to do anything about it and would therefore drop it. Nothing came of it.

The Institute did not have any advance notice of the delivered price announcement of April 18, 1929 or of any other delivered price announcement. They were a surprise to the executive officers of the Institute. The Institute never suggested to any refiner that he make a delivered price announcement. We received notice of the delivered price announcement the same as we received any other price announcements from the refiners. The discussion at the Executive Committee meeting of March 28, 1929, as to [fol. 1202] the effect of differential shipments upon delivered prices had no reference to arbitrary delivered prices. That really means destination prices or prices made up of the refiner's basis price plus his freight application at the point of delivery. It was the actual cost to the purchaser and had no relation whatever to any refusal to

ship f. o. b. refinery. The Warrior River or canal-and-lake port prices were not in effect at that time.

The Institute relayed freight announcements made by the refiners in the same manner that it relayed other announcements. After the refiner had announced delivered prices and while they were still in effect, the Institute took interest in them only to the extent of circulating the announcements and observing whether they were rescinded or changed. We did not take a different position as to the observance of delivered price announcements from that which we took as to the observance of any other announcement.

(Defendants' counsel referred to Exhibits 437-M; 457-Y-3 to B-4, O-4 and Q-4 as cases in which the Institute took up the question of adherence to open announcements.)

In Exhibit 327 the reference to delivered prices was merely identifying the messages to which it referred, but it was an error to have said anything about future policy. It was none of our business and it was not our practice to inquire about the future policy of a company.

The Court: I want to get clear on this, and if you are not clear on this transaction, you better say so, rather than attempt to give us something about it. I confess I don't understand your testimony in relation to the telegram, and I do not understand how the Institute could talk about prices just by mistake.

A day prior to the date of Exhibit 327 some refiner had announced a change in freight application in Indiana. [fol. 1203] Following that announcement various other refiners had made similar announcements and according to our usual practice we had cleared that announcement, circulating it to our list. On this date White called us to ask whether Texas City had made any announcement. We said "no". They asked if they were selling in Indiana. We said we did not know but would investigate. We looked into our records which showed that early in the year Texas City had made some very small sales in Indiana which we assumed to be deliveries at Gary or Hammond which, for statistical purposes, were accounted as part of Chicago. White then wanted to know if they were still offering in Indiana and this telegram was directed for that purpose.

It was an error to refer to future policy. The Institute was not interested in anyone's future policy. It was just an error in expression.

It was contrary to our general policy to ask refiners what they were going to do when they had not made announcements.

In the early part of 1928 announcements of freight applications were very few. During the latter part of that year they increased considerably and in the interest of economy we began to circulate the local announcements by [fol. 1204] hand and continued sending the out-of-town announcements by telegraph. Later, in 1929, a further restriction of telegrams was made in the interest of economy. We employed, in addition to hand delivery, mail for less important announcements, sending in some cases a summary by wire. The territory involved usually determined the importance of a freight announcement. Whether it was a decline or an advance did not affect our consideration of whether it was important or not. Of our freight anouncements, 99% were declines, but we wired them just the same. Less important announcements were those concerning small towns where an adjustment was made because of an error that some refiner had discovered in his prepay list. Later in 1929 the first freight sheets were issued and were sometimes employed as a medium of forwarding announcements. We held the announcements up and sent them out on these freight sheets, at the same time employing telegraph and air mail.

During 1930 we adopted the present practice, which is to circulate all important announcements by wire to out-of-town members and to deliver by hand to the New York refiners. Less important announcements were circulated by mail. Sometimes a refiner, instead of employing a blanket [fol. 1205] announcement, stating in brief terms that he would apply the Savannah all-rail rate or the New Orleans all-rail rate or the Philadelphia lake-and-rail, whichever was lowest, would send in a sheet specifying the points to which he expected to ship. It might be 2 pages long, based upon the general application and would be too expensive to send by wire. We would circulate or forward the announcement received as to general purposes and say that the detailed announcement would follow by mail.

In 1930 we also followed the practice of sending local rate announcements only to refiners who were interested in

that territory. In that year Rolph of California stated at one meeting that he was interested in everything that happened in the sugar business in every part of the United States and from that time we have sent all announcements to all members and others on the list who have requested them, such as general brokers and anyone who asked for them; to the Domestic Sugar Bureau and to the Institute's New Orleans office.

The members did not have a uniform method of sending their freight announcements. They came by wire or by hand and sometimes they were forgotten and came in late, [fol. 1206] retroactively announcing the application of some change that had previously been made. After making an inquiry at the instance of some refiner, we often discovered that they had made their public announcement and failed to send a copy to the Institute. To my knowledge, no one who have ever asked for freight announcements has failed to receive them. We do not send them to commercial agencies, such as Dow-Jones, because it is not the kind of information in which they are interested.

The form of freight announcement has changed materially since the formation of the Institute. Freight changes were few and far between in the beginning. For the first 6 months of 1932 there were over 11,000. Sometimes we have as many as a dozen original announcements a day from each refiner.

Defendants' Exhibit W-4 was received in evidence.

The instances which are set forth in Exhibit W-4 are typical. The basis price announcements are of interest to everybody in every part of the country. With freight announcements that is not always the case. They are essentially local in character and oftentimes a refiner may not even be offering sugar in the locality affected when the an- [fol. 1207] nouncement is made. When he subsequently desires to enter that market, he inquires as to the freight announcement and, if it is different from the one he is applying, he probably makes an announcement in accordance with that of somebody else. Frequently freight announcements are made retroactive.

The freight book was started in the early summer of 1929, for our own convenience, but it became apparent that a summary of all announcements would be of advantage to

some refiners and a recommendation was made to Judge Ballou that it be extended to such use. This summary was prepared and a loose-leaf book with a section providing for each state, except the 11 western states, with which we did not concern ourselves, was supplied to each refiner. From time to time these sheets were supplemented by new announcements and after the supplements became burdensome they were again combined into an additional summary.

There is nothing in the freight book sheets which had not already been relayed in the form of an announcement, with the exception of one period, from late in 1929 to some time in 1930, when we used supplements of the freight book for conveying unimportant announcements. The book has [fol. 1208] not changed in character since its beginning but it has been constantly improved by the suggestions and advices of the members who make use of it.

(Defendants' counsel stated that Exhibits 457-X-4, Y-4 and G-5 to V-5 were instances in which the refiners were criticizing the accuracy of the book.)

We did not keep the freight book up to date. We did not consider the immediate service important for the reason that the refiners already have the announcements and because it became a burdensome job. Sometimes we are weeks and even months behind. We never told any refiner that the freight book was binding on him. No refiner told me that he understood the freight book to be binding on him.

Defendants' Exhibit X-4 was received in evidence.

The first sheet of Exhibit X-4 was issued with respect to Kentucky and was labelled "Kentucky #1". There is a general formula with no names following. The assumption is, when that general formula is given, that that is the announced freight basis of every refiner selling in that area. [fol. 1209] The list with the number of delivered price points listed was inaccurate in that it did not state what refiner had announced the delivered prices, conveying the impression that there was a general practice, while as a matter of fact only 3 refiners, Arbuckle, McCahan and Spreckels, had made the announcement at that time.

On sheet "Kentucky #2" more specific points were listed because additional announcements had been made by the refiners named in the sheet and the Institute had re-

ceived copies thereof. When we show a specific exception or specific application for a point, the refiner has announced that specifically, as opposed to a general formula announcement.

In order to tell what Colonial's announcement is at Allen, Kentucky, we turn to sheet #12 and see that Colonial has made no announcement for that point. It then comes under the general announced selling basis which Colonial has announced.

The fact that there are no names under a general formula means that all refiners selling in that area have announced the application of those general terms and the first announced selling basis. I found out what Colonial's selling basis was at Allen by inquiring what the lowest rate announced in these general terms was at that point. If the lowest rate to Allen, Kentucky, was 49.5, as suggested on sheets #2 and #4, Colonial would be selling at 49.5. When we receive these announced rates we do not verify that they [fol. 1210] are the lowest. That is not part of our business. We take these from the announcements only.

The Institute does not have a traffic department.

In every case, starting on the second page of #12, the figure indicated is the one which would be arrived at by looking at the announced selling basis on page 1, that is, the lowest all-rail or Federal barge rate from New Orleans, Savannah or Philadelphia to that point, but we do not attempt to check that.

Beginning at the March 12, 1929, announcement the heading is changed from "Delivered Price Basis" to "F. O. B." On May 12, 1929 Kentucky #6 is the announced selling basis. Before it was headed "Freight List", whereas here it is headed "F. O. B.", and then the paragraphs were headed before that "Delivered Price Basis" and now they are headed "Announced Selling Basis". Our different terminology had the same meaning.

The delivered price points on Kentucky #4 show Louisville has Arbuckle, Pennsylvania and the McCahan announced price with bags at 45.9. That means they have announced at that point the delivered price application set [fol. 1211] opposite the name and that other refiners were simply relying on the generally announced terms. They are not necessarily the same because the generally announced terms cover all the points in Kentucky and these delivered prices cover only selected points.

Mr. Browning: What I meant to point out was that 3 refiners have announced as delivered prices what other refiners have announced as freight applications without making a delivered price and further to point out they have announced as a delivered price a rate which is far lower than the rate from their own refineries.

By Mr. Browning:

Defendants' Exhibit Y-4 was received in evidence.

Exhibit Y-4, a collection of sheets, shows trucking companies for New Jersey and represents the various refiners' reports to us of the trucking companies that they are employing for hauling their sugar. The statement "The folowing trucking companies have signed non-rebating trucking agreements for the members indicated" is at the head of every list. The Code of Ethics recommends to its mem-
[fol. 1212] bers that they only employ such truckmen as sign non-rebate trucking agreements and the Institute assumed when they made an announcement that they were strictly complying with that recommendation. We at least assumed we had received a list of all the trucking companies they were using. However, they changed from time to time. I do not consider that a refiner was restricted to a name appearing on any of these sheets. The Institute has absolutely nothing to do with the making of the list. It is the refiner's own list which is submitted to us for information purposes only. As far as these sheets were concerned, it was a mechanical job by the Institute of putting the names together and putting out supplements. We had inquiries dealing with transportation matters usually with reference to freight applications, what freight applications are at given points about which a refiner or the sales office wants to know, but the Institute does not have a traffic department. We had inquiries from brokers as well as refiners.

(Defendants' counsel stated that Exhibits 367 and 369 were written inquiries.)

Defendants' Exhibit Z-4 was received in evidence.

The Court: Exhibit Z-4 is admitted in evidence simply to show Ballou's state of mind and not as proof of the facts stated.

[fol. 1213] After I wrote Exhibit 31 to the Hedger Transportation Company on November 29, 1929, nothing happened. It was the close of the lake navigation season and the matter was temporarily dropped. At the time of the opening of the navigation season the next spring we invited Hedger to participate in a conference to discuss openly announced water rates and he was represented at that meeting by one of his associates. We did not consider Hedger disqualified when we invited him to that meeting.

Exhibit 254, a letter from Place to Fisher, never came to my attention until this time, but I suppose it went to the files as such letters usually do. We paid no attention to them. The Institute did not take any action whatever that I know of. That was just another letter from Place. He was our champion letter-writer. Judge Ballou used to say on occasions that he persecuted him with his constant letter-writing.

Testimony of Evan T. Fisher.

I received Exhibit 254 and dropped it in the drawer of my desk, making no answer or doing anything whatever about it. It was something with which we had nothing to do and Place should have known it.

[fol. 1214] Mr. Browning resumes direct examination of Mr. Taylor:

The Institute took no action whatever in connection with Code Interpretation 1-c-3(A) because it recognized that a buyer had a perfect right to buy his sugar f.o.b. the refinery and arrange any sort of private charter he desired. It recommended, however, that this was not the character of service to which refiners or their agents should asign themselves because it was not open to all buyers alike. In actual practice this recommendation had no effect. The brokers continued to promote and use private charters, as did buyers, from time to time.

A pool cargo refers to a cargo of sugar comprising the purchases of 2 or more buyers who pool for the purpose of securing a special or lower rate than might be secured on such quantity as any of them might care to purchase.

This Code Interpretation was discussed at the directors' meeting of June 14, 1928, page 69 of minute book No. 1. It was pointed out that the inclusion of refiners' sugar with buyers' sugar in these pool cargoes for the purpose of making up a cargo was not open to all buyers. There was a considerable discussion as to whether the addition of a refiner's sugar in a pool cargo was a matter of freight application.

[fol. 1215] A shipment of 2,000 to 10,000 bags was required to secure a favorable rate on these pool cargoes as contrasted with a carload minimum of 400 to 600 bags. Relatively few buyers were interested in such large quantities. As a practical matter, customers frequently pooled together to make up one of these large cargoes. It was pointed out that the inclusion of the refiner's sugar with one or more buyers' sugar for the purpose of making the required minimum cargo to secure this lower rate was in the nature of a discrimination in favor of buyers to whom such assistance was rendered and was not open to all buyers.

Relatively few cargoes go out in the course of a year as compared with carloads. There were very few cargoes for Chicago as compared with the number of customers there. The same principle applied to a situation where the refiners made the charter and allotted space to 1 customer. I do not know of any action by the Institute to interfere with customers pooling together to make up a pool cargo. If 2 or more buyers combine their purchases to secure the advantage of a carload rate, the same principle applied as applied to pool cargoes. No attempt was made by the In-
[fol. 1216] stitute to prevent or restrict pool car shipments where the customers made up a pool car. Pool car shipments have been made continuously since the Institute.

There was a question as to whom a pool car should be shipped. Code Interpretations VII-2-(e) provided that, in case of pool cars, shipments should be made only in the name of the customers whose names were indicated on the bill of lading. The original Code provision appears at page 265 of minute book No. 3. It was said that if the car was not consigned to one of the members of the pool it would appear that the refiner was shipping some of his own sugar with that of others to a point which he had not openly announced was a consignment point and that that would give rise to complaints or suspicion on the part of

other refiners. This Code Interpretation was rescinded at the 1930 meeting. The refiners pointed out that the former Interpretation regarding this point had worked to their disadvantage, particularly in credit matters; that they did not have as close control of the sugar as they desired; and also that occasionally mistakes occurred in the distribution of pool cars. They therefore wanted to consign it to themselves in care of their brokers and have the brokers supervise the distribution in order to avoid these disadvantages. As far as I know, no one ever sub- [fol. 1217] mitted a customer's charter to the Institute.

Cross-examination.

By Mr. Rice:

A finding of the Executive Committee had been circulated and Rolph at a directors' meeting late in 1929 said he had never seen it. It was explained to him that it was our custom to send such reports only to the refiners who were concerned with the problem involved in the report. Rolph wanted the Institute to circularize anything that had a bearing upon the sugar industry.

Judge Ballou maintained that the sale of freight below cost was uneconomic. He urged his principle upon the members for its economic desirability. He did not attempt to obtain an agreement among members of the Institute to enforce the principle. During the first year he continuously urged upon them its economic importance but they continued to do as they pleased. They did not enter into any agreement about it. Code 3(c) was part of the original Code and adopted by all the members but that does not constitute an agreement. I think it was Judge Ballou who agitated for the adoption of Code 3(c). I know of no one else who was sponsoring this particular feature. I do not know if there was an objection to it prior to its adoption because I was not at the Institute at the time. [fol. 1218] Judge Ballou's principle of not selling freight at less than cost was first violated in Alabama where the rates were broken down to the barge basis. There was a succession of violations. Wherever a refiner found it expedient to change his rate he did it. It was done in the Middle West, particularly in the Mississippi Valley area around the lake ports. I think it would include the States

of Wisconsin, Michigan, Indiana and Illinois. In the summer of 1930 there was a breakdown of his principle in the Warrior River area and the South. There was no excuse for violating the provision except where there was a differential rate on sugar.

If I testified that Judge Ballou worked hard to have this principle adopted by the refiners I did not intend to. After it was adopted he urged upon the members of the Institute the economic desirability of accepting the principle and working under it.

Delivered prices were established April 30, 1929, and generally covered the areas near the lake ports. I never heard Judge Ballou object to delivered prices but I heard him say delivered prices violated the code principle. I did not hear any member of the Institute complain about the violation of the Code. We received quite a number of complaints from people other than members. All members followed the announcement which initiated delivered prices.

The points which were discussed yesterday in reviewing the rate sheets indicated that the delivered prices had been [fol. 1219] announced in Kentucky, for instance, for days and perhaps for weeks by some of the refiners before they were followed by others. Various delivered price announcements made by 1 or 2 refiners were not followed by the balance and that condition existed for a long period of time.

In certain areas any one refiner could have prevented the adoption of the delivered price system if he had objected to it.

After Code Interpretation Section IV, paragraph 1, was rescinded in September, 1930, the Institute simply abandoned the whole matter. The only reason that the Code provision itself was not rescinded at that time was that a Code provision would have to come before the members of the Institute. The directors did not have authority to do that and I think the fact that it is still in the Code is due to the secretary's oversight. Provision 3(c) became entirely obsolete although it has not actually been removed by formal action of the members. Delivered prices remained in the lake area until May 5, 1931.

I never heard any agitation among the refiners to abandon delivered prices. We did not suggest it ourselves. The

assumption was that they were all satisfied or they would not all have followed it. We did not receive complaints from the members that other members were violating their delivered price announcements, as such, but there were probably complaints that refiners were disregarding or violating their open announcements. If a refiner was applying a rate that was different from the rate that constituted the makeup under which he had announced the delivered price, then he would be violating his open announcement.

Petitioner's Exhibit 472 was received in evidence.

If a refiner who had announced a delivered price in the Lake area, actually sold sugar f.o.b. refinery to a customer in that area, he violated an ethical principle of the Code. He violated his open announcement, which was a cardinal principle of the Code of Ethics.

[fol. 1220] We were not enforcing delivered prices that were announced but were checking up on their observance.

The Institute received some, but not many, complaints from customers about the delivered price system.

On July 24, 1928, counsel's opinion, stating that they believed an agreement upon delivered prices to be illegal, was transmitted to the Executive Committee of the Institute. There was no more than one opinion. It was read at the meeting and my recollection is that it was multigraphed and circularized, though I am not positive about that. We took no action but simply dropped the question and that is the last time it ever came up at an Institute meeting.

Judge Ballou considered the zoning plan akin to the delivered price plan and illegal. It was discussed November 16, 1928, several months after this opinion had been rendered. I believe the representation was made to us that this plan was being employed by another institute successfully and naturally, we assumed, legally. If it was being employed by another institute successfully, that is probably what gave it a reception at this meeting. It was put before this meeting merely as a suggestion and someone [fol. 1221] suggeste that the executive officers of the Institute look into it. The executive officers of the Institute in fact did not discuss this question with traffic managers. Before anything was done Judge Ballou reached the conclusion it was illegal and did nothing about it. I doubt that the question of legality came up at that meeting. Sub-

sequent to the meeting that took place November 15 and 16 I know of no communication to the Institute from members regarding delivered prices or the zoning plan.

Petitioner's Exhibit 373 was received in evidence.

Defendants' Exhibits A-5 to H-5 was received in evidence.

[fol. 1222] JOSEPH F. ABBOTT was called as a witness on behalf of the defendants.

Direct examination.

By Mr. McCollester:

I have been president of the American Sugar Refining Company since June, 1929. Prior to the time I was president, I was general counsel for the company. Before becoming general counsel I was a member of the law department from the time I came with the company in 1919. The first 2 years I devoted almost all my entire time to transportation litigation before the I. C. C. For approximately 6 years before I was on the legal staff of the I. C. C. Since becoming general counsel and president I have kept more or less in touch with transportation matters affecting my company. Prior to becoming a member of the board of directors of the Institute I participated in Institute meetings and substituted for Foster, American's president, who was taken ill in November 1928.

During 1928, when an endeavor was being made to enforce the Code principle on transportation, sugar was moving by differential routes. Our company had the advantage of practically every differential route in the United States due to the fact that we had refineries at Boston, Philadelphia, New York, Baltimore and New Orleans. The op-
[fol. 1223] eration of this Code principle would have been very helpful to us. I do not see how my competitors could possibly have competed if we were going to use differential routes and they did not have them. Some had access to them but none had access to all as we did.

The only recollection I had of a so-called zoning plan was that our traffic manager, Ripley, came to me one day with a handful of papers and said that this was a zoning

plan which Carling of Arbuckle had worked out. I did not even look at it and told Ripley I was not interested in it in any shape or form because it was being advocated as a so-called delivered price scheme for the Institute and I was firmly convinced it was illegal. I did not believe the Institute could adopt any such scheme and did not waste any time by going into it. I had in mind the opinion of Sullivan & Cromwell on the delivered price question and also my own legal conclusions on the subject.

In the spring of 1929 when the opening of navigation on the water routes started, there was considerable unrest in the sugar trade among brokers, buyers and refiners as to the extent to which the Great Lakes were going to be used. [fol. 1224] There was a serious disturbance in the fall of 1928 due to certain brokers chartering barges. It was claimed that certain of the chartering fees had gotten back into the hands of the buyers. I think McCahan announced they would ship out of Philadelphia by rail-and-lake service and apply the canal-and-barge rate from New York, since they did not have any canal differential service available to them in Philadelphia.

On April 22, 1929, the first breakdown of any of the lake ports occurred, due to the fear that f. o. b. shipments were going to become an important factor in the water transportation from the East during that season.

Great Western, which was a beet sugar company located in Denver, Colorado, and which does not have the benefit of water transportation to Chicago and Milwaukee, which are among their principal markets, reduced the selling basis at Chicago and Milwaukee from 49½¢ to 38½¢. It was my thought at the time that Great Western was attempting to meet the canal-and-lake rate from New York, in other words, the barge rate during the open season of navigation. It was lower than the New Orleans barge rate which was at that time 44¢ to Chicago. The rail rate was 54¢.

On April 24 Arbuckle announced, effective at certain [fol. 1225] points in upstate New York located on the canal between Syracuse and Rochester, running across Buffalo, Cleveland, Detroit and perhaps a few other points, rates which they said were as low as any rate a customer could get by any form of transportation to those markets. Those rates made reductions of as much as 20¢ per 100 pounds in the previous selling basis at some of those points.

We did not meet Arbuckle's announcement on the 24th. We met Great Western's announcements at Chicago and Milwaukee. Arbuckle's announcement simply met those rates which Great Western announced to Chicago and Milwaukee. It made rates to these points so low that it threw out of line the rates to all other points in the immediate neighborhood of the points to which they announced the new rates. A rate to any important market substantially below the basis which carriers published for many years, results in a substantially depressed rate and gives the customers in those markets an opportunity to reach further into neighboring territory. The customer in the interior demands a similar reduction in order to continue on the same competitive basis that he was prior to the time the lower rate became effective in the water port territory.

[fol. 1226] I saw that we would have serious complaints from our customers in the interior. I thought it would work discriminations against them and that it would be difficult for us to apply a rate 10¢ lower than the normal basis to a man in Cleveland and not to give it to his competitor 30 or 40 miles in the interior. If we had started to extend it, a customer further in the interior would claim that he should have the same reduction in order to meet competition, with the result that there would be a general breakdown of the entire transportation structure throughout that area as well as upper New York and the Midwest.

I also realized that it would mean very substantial freight absorptions for our company. I held off doing anything with reference to meeting those rates until I could give the situation some serious study.

I spent several days looking into it, received a complete set of rates from our traffic department and decided we would have to adopt some new policy to correct what had been done and prevent the situation from spreading.

I finally concluded that the only satisfactory solution would be to establish a system of delivered prices in those markets, giving the customers the benefit of some reasonable rate [fol. 1227] that we would fairly apply, something out of which we would neither make nor lose any substantial amount of money, to work out some basis of rates to be applied to delivered prices in connection with our basic price, which would make a fair and equitable adjustment to the customer and the refiner.

I locked this thing in the bosom of my mind or conscience and over the week-end at my home in the country, after studying the various rates I could use, selected the one which I thought was fair and prepared what I thought was a fair announcement for American to adopt as its selling policy in these markets.

I had, up to that time, talked to no one in my organization about it. I talked to no one outside of my own organization about it, but in view of the fact that it was a new departure for the company and involved a rather substantial question of policy, and in view of the fact that I was only the general counsel at that time, I thought it should be passed on by one of my superiors and I presented the whole matter to Babst, chairman of our company, on Sunday, April 28. I told him I believed that American, as a matter of policy, should put out this announcement on the opening of business the next morning, without saying anything to anybody, even in our own organization, about it.

[fol. 1228] He was not a transportation man and took my recommendations as to the rates. As far as the policy was concerned, he acquiesced to my recommendation, and on Monday morning I told our general sales manager to have that announcement copied and put out in the regular way. That instruction was followed.

I did not include Chicago or Milwaukee where Great Western had reduced the rates a few days prior to the original announcement. We have always felt that Chicago was more or less a market for the western beet and cane refiners. We try to get all the business we can there but are not very successful, so I did not feel that we ought to assume to dictate to them since they had just a few days before put in this basis by which they attempted to meet the canal rates from the East. We had met those rates and I decided to do nothing further about it.

I did not consult with anybody connected with the Institute in regard to the matter. A year or so previous, in 1928, when these questions were first considered by the Institute Judge Ballou agreed with me that the Institute could not do anything about it.

I had no conversation with Judge Ballou or anybody else other than Babst. I did not talk to any of our competitors or [fol. 1229] their representatives. Not having discussed it with them, I could not have had any assurance that they would go along with us.

I know nothing of the zoning system.

If our announcement had not been followed by our competitors, we could not have maintained it.

Our announcement differed from Arbuckle's only in that we named higher rates. Arbuckle announcement in effect was as much a delivered price basis as ours. While they did not state in the announcement that they would refuse to accept business f. o. b., they did name the lowest rate that any customer could get over any transportation line, so there would have been no incentive for a customer to ask them to ship f. o. b.

Defendants' Exhibit I-5 was received in evidence.

The figures shown in the last column of Exhibit I-5 are the freight applications which were added to our basis price to make up the delivered prices which were announced. They are the actual and not arbitrary freight rates and do not include the tare. They did not increase the applications in effect before Great Western broke the freight basis on April 22, a week before, and in two points they were lower. We [fol. 1230] did not change Chicago and Milwaukee rates on April 29 as stated at the head of the column. We really put them in a day later.

The rates which we adopted for delivered prices were exactly the rates which we had been applying before except at Cleveland and Detroit we made a reduction of 2¢ and 3¢, respectively. In place of its being an increase in rates so far as American was concerned, we actually made a reduction except at Chicago and Milwaukee where we raised the rates to the basis at which they were prior to Great Western's announcement, but we did not do that until after other competitors had raised the rates to Chicago and Milwaukee.

All refiners who competed in that market followed our announcement, some on that day and some in the next day or two. Some of the refiners raised the application from Chicago and Milwaukee to where it was before the Great Western breakdown and we later put out a new announcement and met that (Exhibit 455-3).

After some of the eastern refiners had adopted the 49½¢ rate Great Western followed and brought theirs back to that figure.

[fol. 1231] The Syracuse rate was the lowest all-rail rate from any cane refinery. It was lower than the rate from

our Brooklyn plant so we had to absorb. The Rochester and Buffalo rates were the New York and Philadelphia all-rail rates. The Cleveland and Detroit rates were the Philadelphia rail-and-lake rates. Previously we had the Philadelphia rail-and-lake basis both in Cleveland and Detroit. The Philadelphia rail-and-lake rate to Cleveland was 2¢ less than the all-rail and the Philadelphia rail-and-lake to Detroit was 3¢ less than the all-rail. The Cincinnati rate was the Government Barge Line rate.

Defendants' Exhibit J-5 was received in evidence.

Whether the routes shown in Exhibit J-5 had all been used or were being used I cannot say but there were available rates and available service via all the routes shown to those different cities. From New York we had 6 different routes and rates. From Philadelphia to Detroit we had 3, from Baltimore to Detroit 3, from Boston to Detroit 4 and from New Orleans to Detroit 2.

[fol. 1232] As sugar business is conducted it is not possible to confine shipments to routes taking rates no higher than the rates used in our delivered price announcement. Since we have some 40 to 48 grades and styles of packages it is physically impossible to keep on consignment an adequate assortment of all the grades to supply the demands of the trade at all times. By moving all of our stock to consignment points, it would be absolutely impossible to try to use the differential routes in order to make freight savings as we would have to rush cars by all-rail routes or by higher differential routes to replenish those stocks. Furthermore, sugar at consignment points is often retransited to points beyond and we did not have the proper inbound transit billing in order to retransit outbound.

The rates on the C. A. T. Line to Chicago have been included only to show a comparison with the rate to Detroit and Cleveland. We did not change the rate to Chicago in our original price announcements. The C. A. T. Line service is 2¢ less than the Philadelphia all-rail and lake rate but the service is 8 or 10 days and is only available from New York. It is from 3 to 5 days longer than the rail and lake service and involves 2 handlings as it moves by water to

[fol. 1233] New London, Connecticut, and then by rail to Port Huron or some port on the Lakes, is unloaded again and put into ships. It is not a desirable service because

there are apt to be damage claims due to re-handling. For the same reason barge-and-lake service is undesirable and in addition it is much slower than the Philadelphia rail-and-lake service. We would have additional storage expense if we had to charter a full barge when we did not need to send a full barge of sugar into consignment. We would have our money tied up in sugar and in addition to that we had practical operating difficulties.

The canal-and-lake service was only available to our Brooklyn refinery. There were many times during the year, particularly during the season of open navigation in the summer, when our refineries were running to capacity and because of lack of docking space it was physically impossible for us to load all our sugar for consignment to the Middle West. Our space is taken up with ships carrying raw sugar. Barge shipments are very difficult to handle.

[fol. 1234] I do not recall the points to which other refiners extended the delivered price bases but the area was considerably enlarged. When our competitors announced additional cities for the application of delivered prices we met them.

Our company was not the first to announce delivered prices in the Warrior River area in December, 1929. We were not consulted by any of our competitors before the first announcement. We did not assure any competitor that we would meet the delivered price basis if announced. Delivered prices could not have been maintained there if we had not met them because we were a factor in the southern market. We met the announcements in the Warrior River area in order to save freight absorptions and to prevent discriminations which were being effected by diversions and reconsignments.

At any point where there is a depressed rate, there is an opportunity for a customer to ask to have the goods shipped to a point where the depressed rates are effected and then divert to a point where he really wants the goods, thus defeating the refiner's prepay at the final destination. Therefore, it was desirable to have an all-rail basis of rates so that all customers would be able to get their sugar on the

[fol. 1235] openly announced freight rates as published by the carrier and so that one would not have the advantage over the other when attempting to reconsign or divert.

Competitors did not fully meet our announcement of May 22, 1930, which attempted to establish delivered prices at interior points in Illinois, Wisconsin and Minnesota. We either cancelled or withdrew that announcement within a day or two after it had been made because it had not been met.

The purpose of the announcement of June 20, 1929, which covered Long Island Sound points, and Connecticut, Massachusetts and Rhode Island and Hudson River points, was to save the lighterage absorption in the New York harbor. Hitherto there had been dock-to-dock rates from New York and the refiners had to transport their sugar by truck or lighters to steamship piers at New York to final destination and I met this delivered price. Nobody followed the announcement and we withdrew it very shortly thereafter.

In advance of making our delivered price announcements we did not consult with any of our competitors in regard to any of them and did not advise them we were going to make the announcements in advance of the actual issuance. [fol. 1236] We never had any assurance from any refiner that he would follow any announcement we made.

I have had prepared a statement on the effect of delivered prices on our freight costs.

Defendants' Exhibit K-5 was received in evidence.

My statement of how our tonnage was divided into these different cities and how we had not been able to use the canal-and-lake routes demonstrated that there was not even a substantial use of those routes. At Detroit we only shipped 21,000,000 pounds over the canal-and-lake routes against a total of 126,000,000. We shipped all-rail out of Baltimore more than we shipped by any other route out of any other point and actually took a 2¢ freight absorption.

I am familiar with Exhibits 457-E-3 to L-3 and N-3. This correspondence resulted from a misunderstanding of freight applications and our actual practice. At the beginning of the Institute and for a long time prior thereto it had been the practice of American to sell in the C. F. A. territory on the Philadelphia all-rail rate even though we made ship- [fol. 1237] ments from Baltimore. There was no specific announcement at the beginning of the Institute as to that policy because at the time the Institute was organized nobody announced what their freight applications were or

what they would be. They continued to sell as they had. We continued the policy of selling in C. F. A. territory and the particular point which is involved in this correspondence, the northeastern section of Kentucky in C. F. A. territory. In August, 1928, the I. C. C. made effective new rates on sugar from Philadelphia and Baltimore to points in the Southeast. At that time we made an announcement of what our selling basis was going to be in the territory affected by those rates. There was considerable confusion both in the Commission and among the carriers because the Commission announced on August 20 the all-rail rates to be effective August 29 and did not publish the ocean-and-rail rates, which were the differential rates from Philadelphia and Baltimore to the southeastern territory, until almost a month later. No one knew whether the all-rail rate or the ocean-and-rail rate was lower. On August 29 American announced that beginning August 30 on Baltimore carload and less than carload shipments into Virginia, West [fol. 1238] Virginia, North Carolina, South Carolina, Tennessee and Kentucky points not in C. F. A. territory, it would apply the new rates which were announced August 20 except where the New Orleans rates were lower.

In May of that year we had announced that the New Orleans barge rates would be applicable in Kentucky. Those rates cut the all-rail rates or the water-and-rail rates from either Philadelphia or Baltimore to all of Kentucky except a few points in the northeastern part. Louisville, Paducah, Lexington and the big cities of Kentucky were all on the barge rate but there was a fringe of territory in the northeastern section where Philadelphia and Baltimore rates were lower than the barge rate from New Orleans. At that time our traffic manager was away. The next day the first announcement was found to have been garbled in some way and we put out another on August 30. This made matters worse because in the one on August 30 they tried to say that the Mississippi-Warrior rate from New Orleans would be applicable when on the day before they had simply said the New Orleans rate and that in Kentucky American would apply the Mississippi-Warrior rate from New Orleans or the Baltimore water-and-rail rate or the Savannah rate, whichever was lowest.

[fol. 1239] That announcement left out the portion of Kentucky inside C. F. A. territory and the confusion brought about Place's correspondence.

Our own organization did not understand this notice and we found that in most of the shipments we were applying the Philadelphia all-rail or the Philadelphia water-and-rail, but in about 5 instances to several small points, such as Maysville, Mount Sterling, Vanceburg and Hardin, Kentucky, they had applied the Baltimore all-rail or the Baltimore water-and-rail rates on 6 to 10 cars.

Somebody in our organization discovered that the Baltimore office was not applying our usual selling basis in those markets, although, in view of the 2 announcements which were made in August, they had a right to apply almost anything. On March 11, 1929, when the New York office discovered that the Baltimore office was applying the Baltimore rates rather than the Philadelphia rates a definite letter of instruction was sent to our Baltimore manager stating that in Kentucky the Philadelphia basis would apply unless the all-rail rate from Savannah or New Orleans or the Mississippi-Warrior service from New Orleans was lower, in which event the lowest rate would apply. Ex-
[fol. 1240] hibit L-5 is a copy of a letter from our file which was sent by White, our general sales manager, to our Baltimore manager.

Defendants' Exhibit L-5 was received in evidence.

The first information I had that Place was worried about whether we were applying the Philadelphia or the Baltimore rate at C. F. A. points in Kentucky was a letter dated April 27, 1929, which he sent to White enclosing copies of the letters dated April 5, 15 and 22 which he had addressed to the Institute. A few weeks later I talked to Place about the situation over the telephone and wrote him fully about it on May 13. On May 8, 1929 Place made a public announcement stating that in Kentucky and points in the C. F. A. territory he would apply the Savannah rail rate, Philadelphia rate or the Mississippi Warrior rate. Up to that time and even after that time we could not understand what he had been writing about because we had already corrected the errors which occasioned our letter of March 11 and we were still trying to find out where there was any difference in the application of the rates in that territory.

After this announcement came out on May 8 we were [fol. 1241] still examining the situation and on May 13 I wrote him (Exhibit 457-L-3) as follows:

"Notwithstanding the fact we are selling on what I believe to be the basis contained in your announcement, I wanted to put out this change on Friday but in checking over your announcement I found it contained some inaccuracies."

Then I went on to tell him that in Virginia he was not selling on the Savannah rail or the Baltimore rail or the Baltimore ocean-and-rail rate, but in fact on the all-water rate from Baltimore. He replied and it subsequently developed that neither one of us knew that the Baltimore all-rail rate and the Baltimore water-and-rail rate were identical. There are several other small points in Virginia about which I inquired and we later found that the Philadelphia rate was the lowest. Then I asked him about Wilmington, North Carolina, which he noticed did not conform to the rates which were being applied by all the refiners. In other words, we were applying the water rate from New York and he was proposing the Philadelphia all-rail rate. I told him he was not competing there and he wrote back that McCahan was not interested in selling in the Wilmington market. The concluding paragraph of my letter of May 13 correctly states the situation which existed at that time [fol. 1242] and shows that it resulted from confusion and that Place had not found out that our Baltimore office was applying, after March 11, the Baltimore rates to these few points to which I have referred, when we intended to apply the Philadelphia rate, that he did not know that the situation had been corrected on March 11 and still felt that it was in existence.

I felt in view of his misunderstanding and in view of the fact that the Baltimore office had misconstrued these inconsistent announcements that we should put out a complete announcement clearing up that situation. That is what I meant when I said in my letter of May 13, 1929:

"I am checking over the entire situation again very carefully in order that when our announcement does go out it will be accurate. Unfortunately, I was abroad last August when our original announcement was made, and for this reason I assume no responsibilities for any inaccuracies therein. I know that you have been advised that we are not selling on the terms announced therein, and I am sure that

you will find we are billing the trade on exactly the same basis you are throughout this territory."

After the correspondence with Place I did not give any instructions to our sales office or traffic department to change our freight applications. I helped prepare, with the traffic department, the announcement which we issued May 29 and to the best of my knowledge and belief that announcement made no change in any freight application [fol. 1243] which we were applying after March 11. It was merely for the purpose of clarification.

I regarded as unsound the freight transportation situation which existed at the close of 1931. Various arbitrary rates were being applied to meet trucking competition and water competition and there were few, if any, places in the United States outside of the metropolitan areas where we were not absorbing freight. I thought we either had to sell at a base price all over the United States or continue to absorb tremendous amounts of freight which we would necessarily have to make up in our base price or margin in some way, thereby penalizing the man who was located at points where there were no large absorptions. The only other alternative I saw was for the railroads of the country to adopt a policy of meeting the competition which had grown up on the water lines and trucks and making their rates so low that those water carriers and truck carriers could not cut under them, and then business would go back to the rail lines without absorptions. Since the action which I proposed to take was not successful, the question is facing us today.

On December 3, 1931, the I. C. C. prescribed an entire [fol. 1244] new basis of class and commodity rates throughout the whole eastern and midwest territory. After considering the case for several years it broke up groupings of all kinds and proposed a straight mileage, that is, a distance scale basis of rates, from the eastern seaboard to western points and from western points to the eastern seaboard. The decision was announced many months before but the actual rates of the carriers were not to go into effect on that day. It changed substantially the rates to all the points, the relationship as between the refineries on the eastern seaboard and rates by differential routes which were open during the navigation season. The whole thing

was a new revolutionary readjustment of rates in this entire eastern and midwestern territory.

In view of the confusion which we had all gotten into and the competition between refiners to meet trucking rates and water rates and the breaking down of all the rates into the interior, I decided to try another delivered price announcement, using as its basis the new rates which the I. C. C. was making effective on December 3 and taking the actual all-rail rates from the nearest refinery. I did not have to give consideration to the rail-and-lake rates or the [fol. 1245] canal-and-lake rates at that time because the navigation season had closed. I put out an announcement proposing to make that basis effective the same day as the new rates announced by the I. C. C., hoping to do something constructive for the sugar business and to work out some fair adjustment as between the refiners and the trade which would not be discriminatory and would not cost the refiner tremendous amounts in absorptions and at the same time not give them any opportunity to make any substantial profits.

American's announcement of November 24, 1931 (Exhibit H-5) proposed to change the rates and establish this new basis to New York, Pennsylvania, Ohio, Michigan, Illinois, Indiana, Wisconsin, Minnesota, Kentucky and West Virginia. All refiners met that announcement except Arbuckle. We withdrew it and not only went back to the old rates but we went back to a basis which was lower at a considerable number of points.

Before putting out the announcement we did not have any consultations with reference to it with any representative of any competitor nor with a representative of any of the staff of the Institute. We did not have any assurance or representation of any kind from any competitor that [fol. 1246] he would follow if we put out that announcement.

The general financial results of the railroads reflect better than I can state how intense is the competition of the water lines and the trucks at this time. Beginning with the breakdown of this attempted delivered price basis, due to competitive influence brought about by the differential route, we ran into the period of depression. The high level of rates which the railroads had in effect, due to 5 or 6 general increases in the last 10 years, offered the trucking

companies and the water lines great opportunities to cut substantially below the railroads' rates and do business at some profit.

The sugar trade used the water service, which had improved, and water transportation has developed very rapidly. Trucking, which has become a new factor in the sugar business in the last couple of years, has disrupted transportation cost in such a way that it is in a hopeless and chaotic state. There are trucking rates published for hundreds of miles from refineries today and trucks which bring East a load will take back sugar for almost any price. Sometimes the service is more or less irregular but even so the refiner reduces his rates as low as any customer can [fol. 1247] ship by truck. The absorptions have become enormous and I do not see any hope in the situation, unless the railroads carry forward the policy which they have announced within the last 6 weeks of cutting sugar rates and other rates, on which the trucks and water lines are handling the business, to such a level that it will be impossible for the water lines or trucking lines to make any substantial profit.

In making the downward changes in freight applications during the last year or more I have not consulted with any of my competitors or the staff of the Institute before making them. When changes were made first by competitors and followed by us we did not have any consultation with them with regard to our applications. There may have been instances in which we asked for an explanation or asked if they had stated a rate in error. In the reductions that have taken place in freight applications during the last year and a half I have not been influenced at all by the pendency of this suit. Every announcement which we have made has been made to meet something which our competitors were doing, or some new rate or some new form of transportation which had developed during the recent period where the trucks and water lines have really taken [fol. 1248] all or a substantial part of the sugar business away from the railroads.

At page 5060 of the Record counsel for the Petitioner, in referring to Exhibit 454, a statement showing barge shipments at customers' request and on refiners' own account for the years 1929, 1930 and 1931, stated it showed that the increase in refiners' account shipments over this

period and the decrease in customers' request shipments indicated the Institute put forth continued efforts to keep commerce over the waterways in the hands of the refiners and away from the customers. This statement only covers the Government barge lines in New Orleans. Obviously, if a customer can get a greater advantage by shipping by barge than by all-rail, he will avail himself of the barge service. During the period when he had this opportunity, refiners were selling rail shipments on rail rates and barge shipments on barge rates. After we started to sell on the barge rates in the South and give the customer rail delivery, there was no incentive for him to take delivery by barge and run the risk of the sugar becoming damaged in transit, of the rehandling damage that occurs to packages and of the delays incident thereto, when he could get clean sugar loaded at the refinery by an all-rail [fol. 1249] service.

In getting sugar to consignment points the refiners would naturally increase their shipments over the barge lines in order to avoid freight absorptions which they would have if they did not use barges, but as explained, we could not make all shipments that way.

A filling out by the refiner of pool cargoes for customers means that the refiner would use that barge to ship his sugar to consignment in place of chartering a barge of his own. If these barges were moving to points where American did not carry consignments, obviously we could not fill out the cargoes. Furthermore, we did not know what shipments a customer wanted or what type of sugar to put in to fill up the cargo. We might put in something which we could not sell.

At port cities where we carried consignments it would be impractical for us in some instances to use a barge and fill in with bulk bags in lieu of loading up a full barge of our own. If American openly announced it would fill up any barge with 100 to 300 tons of sugar, points which were [fol. 1250] or were not consignment points would be flooded and stocks duplicated, thereby incurring unnecessary warehouse and storage costs, and tying up money. There is also the possibility of lack of facilities or sugar at the refinery. We plan to ship certain amounts to consignment points, to the trade, or for export and if we had

to supply any customer who bought a barge we could not follow our schedule.

It is also impractical to fill up box cars because we would have to take consignments at every point at which the customer requested us to fill up the balance of a car needed to make the carload minimum. The refiner could not dispose of the sugar because he has limited consignment points and if it were openly announced that everybody could have the benefit of filling up a carload that would mean that any carload buyer in any town where there were enough people grouped together to make up a carload of sugar could require us to fill up the balance of the car and we would have to have a consigned stock at that point; that would require warehouse arrangements and in the end would result in bringing the sugar back to the refinery because nobody wanted that particular grade. If we open consignment stocks all our competitors would do like wise and would [fol. 1251] result in causing everybody spending a lot of money unnecessarily.

I have never consulted with any of our competitors about price changes. I have never advised any of our competitors what American proposed to do or intended to do about its price. I have never asked them to fix their price nor to lower or maintain their price. I have never suggested to them what they should do about their price. They have not asked us to lower or maintain our price. I never asked one of our competitors what he intended or proposed to do about his price. I have never asked any of our competitors if they would follow any price change which we initiated. I have never asked any of our competitors if they would follow any price change initiated by another refiner. None of our competitors have asked us if we would follow any price change initiated by any other refiner.

I have never advised any of the staff of the Institute what we proposed or intended to do about price. None of the staff of the Institute asked us what we intended or proposed to do about prices nor have they suggested what we do about prices. I have never asked any of the staff of the Institute to intervene with any other refiner about his price changes.

[fol. 1252] Cross-examination.

By Mr. Fly:

The figures in Exhibit J-5 were made up within the last month for use in this case. They are the rates which I had to the points shown on that Exhibit, but in addition to that I have rates to a number of other points in upper New York State and lake ports. I obtained the figures from the traffic department, either from Ripley or from one of his assistants.

As far as I knew at that time no one, either inside or outside of the company, knew I was considering this problem. I kept it secret from other members of our organization so there would not be any claim made by anybody at any time that there was any concert of action. I did not talk on the subject to our competitors a couple of months prior to the time of the announcement.

I talked to Stone about November 15, the time that the minutes of the Institute referred to some zoning plan. I do not remember the time or the circumstances but I do recall that at some time Stone, who was an officer of the alcohol company, which is a subsidiary of Spreckels, told me that they had a system of delivered prices in the alcohol business. He hoped that some scheme or something similar would be adopted in the sugar business. He did not open up the discussion without that thing in mind.

[fol. 1253] I cannot recall whether I talked with Judge Ballou before or after the Sullivan & Cromwell opinion. The best of my recollection is that the discussion was very general, that the matter was discussed and that the Judge said to me that he did not think the Institute could do anything about it and I told him I did not think they could either.

We never discussed any system in reference to delivered prices. I could not have discussed the alcohol system because I knew nothing about it except that I understood it was a system of delivered prices.

I did not state that the chief trouble which gave rise to the need of delivered prices was f.o.b. shipments to upper New York and midwest area. The chief trouble I had was after the Arbuckle announcement. There was some unrest in the early part of 1929 due to the brokerage situation in relation to practices which had arisen in the latter part of

1928 and due to the announcement McCahan made concerning shipping from Philadelphia on rail-and-lake rates and applying the New York Barge canal rate, but American was not faced with any serious trouble until Arbuckle's announcement because it had differential routes from all of [fol. 1254] its refineries and could meet anybody's competition. I thought f.o.b. shipments lead to the Great Western's announcement but do not know what led to Arbuckle's. I know more about Great Western than I do about Arbuckle because it is perfectly evident on the face of the situation that there is a difference between them. Great Western had no differential routes. Arbuckle was in New York with the lowest differential rates available.

I have no present recollection, aside from reading the minutes, as to what the Institute did. I was not present at the meeting of March 21, 1929. All I know about it is what is in the minutes. Foster was present at the meeting but I do not recall that he informed me as to what went on. There is nothing in these minutes about delivered prices.

The discussion at page 230 of the minute book dealt with the question of attempting to ascertain what the barge line operators, the companies that owned the canal boats, were going to charge for transportation to various northeast and midwest destinations during that season of navigation. It did not refer to what the refiners were going to charge their customers over these routes. I have no recollection [fol. 1255] that we discussed at this meeting or other meetings around this time what the transportation companies were going to charge or what the refiners were going to charge their customers.

I have examined the minutes of the Executive Committee and directors for the 4 weeks preceding April 29 and my recollection is that I was not present at any meeting at which the question of the rates which the refiners would apply on refined sugar to the canal and lake ports during the 1929 season of navigation was discussed, except for one qualification. Place wrote a letter on April 20 to me and a number of other refiners referring to some meeting at which the question of some freight application to Chicago or some lake ports was discussed. I was not present at any such meeting and I don't understand why the letter was sent to me except that I was one of the directors of the Institute at that time. My recollection of the April 4 meeting is that the

only subject which was discussed was the subject which is set out in the minutes, which was not freight rates on refined sugar. I have no recollection of the meeting which Place refers to in Exhibit 457-Q-3. I have no recollection of the meetings which he refers to when he states "made on similar shipments to Chicago" and "both last week and [fol. 1256] this week", but I testified that I had notice of this Place announcement and this was one of the unrests which existed at the beginning of 1929, so whether or not I was present at the meeting I knew that Place was giving, on rail-and-lake shipments from Philadelphia, the lowest canal-and-lake rate from New York.

I have no recollection of the report of the Operating Committee at the meeting of April 4 but my impression is that it had something to do with the question of legal liability while the sugar was in transit and whether or not the refiner had to drop the sugar into the hold of the vessel and be entitled to an allowance by the barge company. At one time certain barge companies were naming rates and were giving to the refiners an allowance for loading. It enabled them to sell their transportation to the refiner and some question arose about insurance and where the liability lay in the event of loss and damage in transit.

At the meeting of April 11, 1929, there was also referred to the committee the question of whether the payment for an invoice was due—so many days after shipment or so many days after arrival. In the case of differential ship-
[fol. 1257] ments, on account of the slow service for a number of years on all-barge shipments out of New Orleans, the terms of payment were 14 days after shipment. Then it appeared that some refiners applied certain payment terms—14 to 7 days—according to the length of service on the differential route from the East. Then the situation broke down. Everybody applied 7 or 14 days after arrival. That had to do solely with the question of when the invoice was due.

When you put depressed rates into the lake ports and do not correspondingly reduce the rates into the interior for a jobber who is competing with a jobber at the lake ports, you bring about a discrimination against that man in the interior point in that he is not on the same relative basis that he was prior to the time that the rate to the water port was

reduced. That condition existed after the Arbuckle announcement.

At the meeting of the Executive Committee of April 25, 1929 there was a discussion of the problem of discriminating practices in connection with the barge situation. The canal and lake barges, other than those on the Mississippi, were privately owned and under private charters. In the fall of 1928 it was rumored that a certain broker had char-
[fol. 1258] tered a number of barges for a certain barge company and when a refiner was in the market for bottoms the refiner would charter these barges from this broker, paying him more than the broker paid to the barge company, and that the money which the broker made on that transportation deal was in some way passed back to the customer, who ordered the shipment to go out by these particular barges, the sugar having been sold by the same broker. There was also a question of rebating by the barge companies themselves.

I knew we would have requests from the trade to make the same reduction at interior points as were made at the lake points. I did not see how we could resist these requests because I thought they were reasonable. I assumed there would be complaints about the system which we proposed to install.

American did not initiate delivered prices in the South on December 14, 1929. I do not know what led to them. We simply followed after some of our competitors as we were competing in that territory. Prior to delivered prices all refiners were selling at the barge rate from New Orleans and shipping all-rail. I do not know what troubled Savannah about that except the absorption of freight which
[fol. 1259] American was also absorbing.

I did not say that we insisted upon and succeeded in having most of our sugar moved by barge except as to consigned stocks. There are 2 classes of shipments: one which goes to consignments and one which goes to customers. When we were selling on the barge rate and delivering all-rail, if a customer ordered a car of sugar from us and ordered it shipped rail, we had it shipped rail and absorbed the freight. That is what we were doing prior to the time we had delivered prices in the South. We were absorbing from 8¢ to 10¢ a hundred on every pound of sugar. I do not definitely know what Savannah was absorbing to get

into that territory but I think it would largely depend upon the markets.

As you get nearer the Savannah territory, they did not absorb as much as they did in the more westerly markets near the Mississippi. Either Godchaux or Savannah made the first announcement in the South. All refiners needed the change in the sense they did not like to absorb the amount of money they were absorbing in that territory. We followed in the Warrior River area, first to make a saving and second to defeat the diversion and transiting of shipments.

[fol. 1260] Exhibit K-5 has nothing to do with applications. The column "Freight and Switching Costs" shows the total transportation expense we had to pay to get the sugar to those markets. If we were quoting a rate to Detroit, based on actual rates, whether the application included the switching cost or whether it was merely the actual freight rate plus the tariff, would depend on whether that sugar was being delivered out of consigned stocks. If the sugar was shipped direct to the customer the railroad tariffs provided for reciprocal switching facilities and in some markets where it moves into consignment by all-rail one might get that cost absorbed, but the switching cost, which is referred to here, is whatever actual switching cost we had to pay to put that sugar in the customer's place of business.

We combined the storage expense with the freight absorption figures only to show that we did not make a profit on the transaction. I do not contend that we would not have had substantial storage expense even though we did not have delivered prices. It is only to show that when you consider the entire picture, we did not make any profit on the way we handled our sugar during the period of delivered prices. No move in the price of sugar was brought about by our an-
[fol. 1261] nouncement. We had not changed our selling basis and as a matter of fact our announcement brought about a reduction in rates rather than an increase.

[fol. 1262] Louis R. Campiglia recalled.

Redirect examination.

By Mr. Browning:

C. & H. absorbs a good deal of freight except in the 11 western states. That condition has existed ever since I have

been with C. & H. and there has been no change since the Institute. We absorbed freight in the entire river territory, which includes the Mississippi Valley, Texas and the area east of the Mississippi and south of the Mason and Dixon Line, except Virginia and North and South Carolina. On the Pacific Coast we give water or rail service and the customer pays the rate applying to the service that he uses. That condition has existed at all times before and after the Institute.

We sell in the territory beyond the 11 western states because we and other producers located in the 11 western states produce a great deal more than can be sold or used by the population in that territory.

Prior to the Institute C. & H. announced its changes in freight applications by sending instructions to its principal brokerage office in Kansas City, the Seavey & Marsheim Brokerage Company. They distributed announcements to the trade generally. There were very few changes before [fol. 1263] the Institute. There have been more since. We make them in the same manner as we did prior to the Institute. In addition, we send our freight sheets by mail to the Bureau and to the Institute, after we have notified our brokers, for communication to the trade. Our brokers do not notify the Institute. They send the information to their corresponding brokers, Daub & Carr, in New York. I understand that Daub & Carr have given the information to the trade in New York for many years and after the formation of the Institute they added it to their list.

Defendants' Exhibit M-5 was received in evidence.

I am familiar with Judge Ballou's efforts in 1928 in connection with the transportation principle. By the end of 1928 C. & H. had decided that the principle was all right, but it would not work out in practice. When we entered the Institute in October, 1929, we considered the principle a dead letter and have considered it not in effect.

[fol. 1264] Since C. & H. became a member of the Institute, it has never been interested in the substance of the freight applications which we have quoted except that they be publicly announced. C. & H. receives relays of freight announcements from the Institute and also from brokers and the trade. We usually get the information from the brokers first.

We receive the Institute freight book and use it as a check

and a reference. It is usually somewhat behind. We depend on our own compilation of rates for our use. I am in charge of the announcing of freight applications for C. & H. I have never asked a competitor to increase, maintain or reduce a freight application. No competitor has ever asked me to increase, maintain or reduce mine. The Institute has never asked me to increase, maintain or reduce a freight application. We had some communications and correspondence from Judge Ballou about the maintenance of his principle early in 1928. C. & H. did not have any notice of the delivered prices announced for canal and lake ports late in 1929 before the open announcements were made by the refiners. We did not receive any other delivered price announcements from our competitors. We have followed some, but not all, [fol. 1265] delivered price announcements of our competitors.

Referring to Exhibit G-5, we did not follow the announcement of McCahan and Godchaux in Illinois outside of Chicago in March, 1930, together with a withdrawal of those announcements. We did not follow the announcements of American, National, McCahan, Pennsylvania and Spreckels on delivered prices in Illinois, Wisconsin and Minnesota outside of the lake ports. We followed delivered price announcements by adopting the same application which had been announced. We did not announce that we would not sell f.o.b. refinery. We would have been willing to do so but it could not have been done because our rates were higher. We have never refused to sell f.o.b. San Francisco to anybody at any time before or since the Institute. In the western territory we have been asked to sell f.o.b. San Francisco and sell that way continuously in the 11 western states.

C. & H. has reduced freight applications since the formation of the Institute. It reduced them since March 30, 1931 when the Government's suit was instituted. I recall Arbuckle's announcement of May 6, 1931, which made a considerable reduction in the freight application. We made [fol. 1266] our announcement (Exhibit M-5) on May 6 following receipt of the Arbuckle announcement. The fact that the Government had instituted this suit did not affect our action in any way whatsoever. We did not think of it when we decided to do it. We were thinking of our situation on those rates. In the discussion in our organization

with regard to changes in freight applications since the institution of this law suit, the Government's suit has never been mentioned as a consideration.

Our contracts provided that we have the option of routing our shipments, although requests from customers for specific routings are followed whenever we can. In practically every case we complied with a request for a particular delivery. The situation has been the same before and after the Institute. The amount of freight absorbed by C. & H. depends upon the particular destination because we have a blanket rate from San Francisco to practically the entire territory, which we define as the River territory, from Chicago and St. Louis west to the western 11 states, whereas the rates from competing points are lower than from San Francisco. These rates vary at different points.

[fol. 1267] The matter of transiting or diverting shipments by customers first came to my attention when I came with the company in 1919 because of the blanket rate we had over the country. Our blanket rate over the territory, as compared with the various rates to competing points, presented an opportunity for a buyer to order sugar at a point which, for instance, took a 50¢ application and which presented the opportunity for a buyer to stop that car at an intermediate point where the competitive rate and application may have been around 70¢. Our freight rate was 84¢ in both cases. Before the Institute we traced all of our shipments. We had a car tracer system which our traffic department developed, through which the railroad companies reported to us the date and destination of deliveries. Our practice has not changed in that respect since the Institute. Where we found that a car had been transited or diverted prior to the Institute we corrected the application to the final destination point, issued a corrected bill or set up the additional charge for the amount.

If a buyer requests a diversion of shipment or permission to transit and is willing to pay the application at final destination, we cooperate with him. We have never attempted [fol. 1268] to prevent a buyer from transiting or diverting a shipment when he was willing to pay the application to a final destination. We have never refused to do business with any buyer, broker or warehouseman or any one else because of transiting or diverting of shipments.

The figures in Exhibit U-4 correctly show the total shipments by C. & H. on the C. A. T. Line. We made no shipments on that Line except in 1931 when we shipped 4,400 bags. In 1931 we had some sugars in the New York harbor which had been delayed in transit through the canal and which arrived during the closing of the lake navigation and could not be shipped over the all-water route which we had been using prior to that time in 1931, so we used this Line as the best and cheapest means for getting the sugar to the lake port markets. We did not ship by the C. A. T. Line in the preceding years because we did not have sugars in New York. The first year we shipped sugar to New York was 1930. Prior to 1930 we shipped direct by rail or by New Orleans. We did not ship by the C. A. T. Line in 1930 because we had an opportunity at times to ship the sugar by all-water routes. No Institute representative ever said anything to me about whether we should ship by the C. A. T. [fol. 1269] Line or not. I never heard that subject mentioned.

We have no consignment points in the 11 western states except 3 small ones in Utah, and at one time we had 3 or 4 in Colorado in the beet district. There are very few consignment stocks carried by anyone in the 11 western states. That was the situation before the Institute and it has not changed. In 1924 and 1925 we had a few consignment points in our sales territory east of the 11 western states at central locations, consignments for serving the trade area around those locations, or for re-consignment from points in the western part of that territory to points further east. Of the latter Omaha and Wichita are 2 points at which we can reconsign into practically all other parts of our territory. In 1924 we probably had a dozen such points. The requirements of the trade in that area and the availability for consignment for distributing determined the places where we put these stocks. Our primary purpose was not to carry the sugar for the local buyers in a particular city but where these stocks were located we made local deliveries or permitted withdrawals from those points. Our primary purpose was to serve the areas [fol. 1270] around the consignment points and for retransiting.

C. & H.'s customers are wholesale grocers, jobbers, manufacturers and chain stores which we classify as wholesalers. In the sugar business a jobber and a wholesale grocer mean

the same thing. I was a jobber in St. Jose, California from 1889 until I came with C. & H. in 1919. As a jobber, I carried sugar. A jobber draws sugar in carload lots from the refiner, takes it to his warehouse, resells it to his retail customers in accordance with their needs and makes delivery usually with a mixture of other groceries. He distributes to the retail trade in his city or his territory. C. & H. sells to jobbers and wholesale grocers instead of direct ot the retail trade because we believe that the wholesale grocer can more economically distribute the sugar than we can ourselves. If we had to sell to a large number of retail dealers scattered all over the district, instead of to wholesalers in a central distributing point or points, it would involve the carrying of a large number of stocks, a large quantity of stock, credit risks, bookkeeping, accounting, sales effort, all of which are unnecessary because the jobber performs part of those functions of distribution to the retail trade and does it more economically than we think we can do it. We would have a considerable problem to [fol. 1271] keep track of credits of a lot of small retailers scattered all over the country.

A carload of sugar is not an unusual quantity for a jobber to purchase in my opinion. Most any jobber handles a carload of sugar on an average of 1 car a week. He determines what assortment he wants from his knowledge of the demands of the retailers in his territory and from the business that he has had from them in the past. In my 20 years' experience I had no trouble in predicting the assortment I needed.

Our practice on consignment stocks changed in 1926. The number of points were constantly increasing and by the end of 1927 we had around 100 consigned stocks. The refiner who first put a consignment stock in a town obtained a sales argument and there was a slight advantage in his ability to make sales. He did not retain that advantage very long because other refiners put in corresponding stocks. As compared to a jobber, a refiner would carry a larger stock and, not having the same knowledge of the retail trade requirements, would carry a larger assortment so as not to run short of certain items. He would carry more stocks than the jobber would and when stocks were carried by different refiners, there would be a duplication [fol. 1272] of several stocks of that kind carried in a town. A jobber may carry in his stock the sugar of several re-

finers. He may have had a demand for more than 1 brand of sugar or he may have wanted to have a source of more than 1 supply. In my opinion, the additional consignment stocks that were put in in 1926 and 1927 were not necessary to give prompt service to the trade.

Consignment points may not have been necessary in order to give prompt delivery, but they enabled a jobber to give prompter service to his trade. We could give prompter service from consignment than we could from the refinery to someone in the neighborhood of the consignment points if we happened to carry what he wanted at any particular point. But where they had, as in the earlier period, stocks at reconsignment points close by, the other territories could get sugars by reconsigning them to the markets within a day or 2 and as a rule reconsignment stocks were so placed that such service could be given.

When we greatly increased our consignment stocks in 1927 a large portion of the community served by us did not have consignment stocks. They added a great deal to our cost of doing business by reason of investment in the stock, insurance, storage accounts and accounting. If we had a consignment point, we would have to have a consignment [fol. 1273] warehouse at that point and obviously we did not have a warehouse unless we had a consignment stock. When we established a larger number of consignment stocks in 1927, we found the warehouses in the smaller places did not compare with those in our larger strategic points. The warehouses in the smaller cities were not of the same size and class and did not have the same facilities that the larger warehouses in the larger cities had. Our policy is to limit the consignment points to those that are necessary to serve adequately the territory in which we operate. We have added consignment points in our sales territory which were not included in the Institute recommendations. The Institute has not made any recommendations for States of Illinois, Missouri and Kansas as far as I know. Missouri and Illinois are particularly overrun with consignment points. Stocks are carried in a great many points and in small cities with just a few thousand population scattered over those states. The sugar does not move fast from those stocks. We were attempting to withdraw our stocks in Illinois which we considered unnecessary and we would like to withdraw them, but we cannot if competitive stocks are kept there without taking a

competitive disadvantage, so we feel unable to withdraw [fol. 1274] them from many points where we would like to. We usually cannot get out of a town unless a competitor does so. C. & H. has not determined its consignment points by the Institute recommendations. Our action has been determined by our individual judgment and the action of our competitors. That judgment is based on the acts of our competitors and upon the condition that they withdraw when we do. Mr. Higgins: We admit that the refiners tried to limit consignment points and that they did it concertedly. They have not been successful in a good deal of this area in which they tried. We have never considered the Institute's recommendation of consignment points to be in any way binding. C. & H. was free at all times to take any action it desired. In some cases we could not withdraw unless competitors did. We did in fact add consignment points where the Institute had made recommendations for the state.

Our company periodically reports certain statistics to the Institute. We have been making them since its beginning and before our company was a member. We did so in order that the statistics can be complete and so we would receive copies of the consolidated reports which were made from the statistics of each refiner. We sent a weekly report of the number of hours that the plant had operated, the number of days it was in operation during the week, the number of pounds of raw sugar melted during the week, the weekly total deliveries of refined sugar from the refinery, the total weekly deliveries of refined sugar from [fol. 1275] consigned stocks, the total sugar on consignment at the close of the week, which would be Saturday, and the total sugar stored in transit at the end of the week. Except for the 11 western states, which are reported as 1 figure, we also sent figures, for each state, of deliveries ex-consignment.

We reported the refined sugar on consignment by states at the close of the week, sugar stored in transit at the end of the week by states, a report of the shipments by differential routes for our own account, shipments by differential routes at customers' request, shipments by barge routes for our own account and at customers' request for the week. In making these reports, we used the Institute's printed form, Exhibit I-2. The figures are filled in the proper column with the date. Once or twice a month,

when we have accumulated a number of sales records, we report the sales of damaged sugar, frozen stocks and at that time send a carbon copy of the actual invoice which is rendered the customer for such sales. We report after the sale is made.

I reported to the Institute our raw melt by weeks for the years 1925, 1926 and 1927 and also our refined stocks by weeks for the year 1927.

[fol. 1276] We have furnished the Institute figures showing the capacity of our refinery over a period of years. Since 1923 our capacity has been 2,500 short tons of raw sugar. Our refinery does not operate every day in the week and shut down on Sundays. We have a plan for operating for 12 days and then shutting down for 2, thereby reducing the number of shut-downs per year from 52 to 26.

Defendants' Exhibit N-5 was received in evidence.

Exhibit N-5 is an inter-office communication from Seavey & Flarsheim, our brokers at Kansas City, to the branches. We issued these instructions some time prior to the time we withdrew from other than public warehouses in 1927.

I do not recall whether our original instructions to Seavey & Flarsheim with regard to the investigation of warehouses to determine whether or not they were affiliated at the time of this withdrawal from the affiliated warehouses in 1927 was in writing or was oral, but there were such instructions. It was the practice of Seavey & Flar- from that time on to make such investigations before recommending warehouses for our use. They did not recom- [fol. 1277] mend any warehouse that had affiliations because they had just received instructions to withdraw from those who had and these instructions would have been nullified if they had done anything else.

Defendants' Exhibits O-5 and P-5 were received in evidence.

Recross-examination.

By Mr. Fly:

A freight application change is sent to our brokers, Seavey & Flarsheim, usually by telegraph, confirmed by mail

and followed by detailed rates sheets. We communicate with the main office at Kansas City and they communicate with their branch offices. Seavey & Flarsheim send the notice to Daub & Carr in New York who furnish that information to the Institute.

We send the Institute our rate sheets. They are made from the different announcements and are mailed to the Institute later. We do not wire direct to the Institute at the time of our announcement of a change in freight rates. They get our rate sheets later. We do not wire them price changes and probably for the same reason we do not wire them the rate changes.

Seavey & Flarsheim cover the territory east of the 11 [fol. 1278] western states, including Texas, the central states, New Orleans and the southeastern part of the country. We have separate brokers in Detroit, Cleveland and Pittsburgh. We consult with Flarsheim. He has no authority to make our policies. He has attended some of the Institute meetings.

The opportunities for transiting has existed as early as 1918.

Redirect examination.

By Mr. Browning:

Prior to the Institute and as long as I can remember we traced all our shipments in order to establish dates of deliveries on which we based our payment terms and our guaranty terms and to establish the final delivery point or destination on which the application was based.

We reported to the Institute the names and locations of warehouses where we stored our sugar, including warehouses where we had consignment or reconsignment stocks.

Recross-examination.

By Mr. Fly:

I do not remember any specific instances of transiting. I know that transiting or diversions or both did occur from time to time. I know of no specific instance where we [fol. 1279] collected the additional freight application. I know there were instances where we diverted or transited at the request of the jobbers with the arrangement that

the bill was to be corrected to the final destination point or the additional charge set up. I do not recall any instance where the jobber took control of any shipment and transited it or diverted it to a higher netting territory and we collected the additional freight application. It is my recollection that that was done.

By Mr. Browning:

We had a well established policy prior to the Institute that, in case any of our shipments were diverted or transited to defeat our openly announced freight applications, we would bill and collect at destination.

By Mr. Fly:

I don't recall that we had instances before the Institute where the customer transited or diverted shipments and we billed him for the additional freight application without his consent. It probably did not happen in 1927.

[fol. 1280] HANS C. PETERSEN was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am a retail grocer residing at East Chicago, Indiana, and own 3 stores. I have been in the retail grocery business since 1909. J. Walter Tyer of Sacramento, California, is president of the National Association of Retail Grocers and I am vice-president. The N. A. of R. G. is an organization of independent merchants and retail grocers located all over the country. It has 31,000 members. One becomes a member of the National either through a state or a local organization. I have attended the last 10 annual conventions of National. At these conferences we discussed principally the problems of the retail grocers.

Selling sugar has been part of my business since 1909. Sugar was always considered a necessary evil in the grocery business as far as the retailer is concerned. In the

years 1925, 1926 and 1927 I felt it was a necessary evil. We did not push it because there was not enough profit to pay our overhead expense. In many cases the sales price was barely more than the actual cost. In 1928, 1929, 1930 and 1931 we found sugar quite profitable in our business. [fol. 1281] In the last 3 or 4 years we have increased our volume approximately 25% simply because of the fact that it has been profitable to push sugar. It is a commodity which enjoys a large demand, is easily handled and provides a good turn-over. We are able to make a substantial margin where formerly we could not because of chain-store competition. We have chain stores but there seems to be a difference in the chain stores' attitude but I do not know the reasons. Chains have been increasing since 1928. A number of years ago they used sugar as a loss leader or as a foot ball more than they do today. The price I charge for sugar is affected by the chain stores' price. In 1925, 1926 and 1927 the chain stores in many cases sold for less than the price at which we could buy. There has been a change in that situation since 1928. I do not remember a single instance where they have sold sugar for less than the price at which we could buy.

I am familiar with the practice of retailers generally throughout the country in 1925, 1926 and 1927. The independent grocers of my acquaintance, numb[illegible]nto the thousands, did not push the sale of sugar during 1925, 1926 and 1927 because there was no profit in its sale.

[fol. 1282] From the years 1928 to 1931 grocers generally over the country have pushed sugar because it has become profitable. Trade abuses which had existed prior to the Institute's inception had been done away with. Through my connection with the National I have been very close to jobbers and in some cases warehousemen, but especially jobbers. In my opinion rebating existed. We felt certain practices of tricky brokers had been eliminated. It was a common practice of jobbers to take advantage of a rising market and bill out his sugar and to have none on hand when there was a decline. I account for the change which enables us to get this small profit to be the result of the elimination, since the inception of the Institute, of the secret rebates which the large but not the small buyers received.

Defendants' Exhibit Q-5 was marked for identification.

Petitioner's objection to the admission in evidence of Exhibit Q-5 for identification, a resolution of the National Association of Retail Grocers which commended the Institute, was sustained and an exception taken.

Cross-examination.

By Mr. Rice:

I never went to a jobber and represented myself as a chain store operator. I operate under the name of Petersen's Food Shops. We sell all sorts of groceries and meats [fol. 1283] and have 3 stores in East Chicago and have done as much as $250,000 a year in all 3 stores.

My first connection with the Institute was at the time of the second meeting of the Trade Practice Conference of the grocery industry. The first session that I attended was in Chicago. It must have been since the Institute's formation because Judge Ballou was present at that meeting and sat in the conference. The sessions occupied almost a week. I do not remember what he said. He read the Code of Ethics of the Institute at one of our committee meetings.

Our sales of sugar have increased 25% in the last 3 or 4 years beginning approximately with the formation of the Institute. Retail prices have been about the same. In 1926 and 1927 when we sold about 7 bags of sugar a week in the 3 stores we did not buy in carload lots. We sold approximately 10 bags a week, or 500 bags a year in 1928 and approximately the same number in 1929. We are selling less today because our business has decreased considerably, varying with the production of fruit. Since the first of the year we have averaged 8 or 9 bags. In 1926 and 1927 our sales were about $160,000 per year and increased slightly in [fol. 1284] 1928. I would say the sales in 1930 and 1931 were $175,000 or $180,000. Our sales of sugar increased in percentage considerably more than our total volume of business increased.

The increase in 1927 from $160,000 to $250,000 in 1929 is an increase of 60%. I cannot really answer whether our sales of sugar increased 50% or 60% from 1927 to 1929. I gave approximate figures in each case. Assuming my

sugar sales increased 25%, it is my impression that that situation is typical of independent stores. There might be other cases where the percentage was even greater and there might be some places where the percentage was less. I believe that the total sales of sugar by small stores increased from 1927 to 1929 but I have never collected any figures nor have I read any.

I believe that the Institute has done something to eliminate the sale of sugar as a loss leader. I am not aware that the Liggett Drug Store Company has been selling sugar at 2¢ a pound just very recently but I am not surprised at anything they might do.

We started pushing sugar some time in 1928 by featuring it and keeping it where people could see it. We put it on our hand bills occasionally and were able to feature it at a cash price and still make a profit. We opened our second store in 1925 and the third in 1927. We do approximately the same amount of business in each store.

After 1928 I spoke to local grocers about pushing the sale of sugar and also with people about the country and [fol. 1285] also with members of the board of N. A. of R. G. All the members of the board are not small retail grocers. One of the past presidents, E. J. Kamper, of Atlanta, Georgia, does $1,500,000 a year. I talked with him and he told me that the general feeling has been that it was more profitable to handle sugar than it was formerly. We did not discuss sugar in 1928, 1929, 1930 or 1931 openly on the floor of the conventions of the N. A. of R. G.

Redirect examination.

By Mr. Peck:

I have talked to thousands of retail grocers about the sugar business since 1928 because I attended quite a number of conventions. I have 4 or 5 speaking engagements this year at state conventions and matters of trade importance are always discussed. Our discussions of the sugar business were not limited to the floor of the convention.

I am not here as a prepared witness and the testimony naturally is given without any thought and I might have misstated some things according to my actual business. Naturally when we had an extra store our volume increased considerably.

Mr. Rice: In view of this confusion I think that we have a perfect right to ask for documentary evidence showing exactly what Petersen sold from 1925 to 1931.

The Court: Or you may suggest to the Court that I should not pay very *must* attention to this witness' statement.

[fol. 1286] MARTIN E. GOETZINGER recalled.

Direct examination.

By Mr. Browning:

Arbuckle sold sugar at the canal and lake ports in a small way in 1928 because our business fell off about 50% in 1927. I never found out exactly what all the reasons were although I think they all pivoted around the new barge rates which were a disturbing situation. Our refinery is located at New York. We did not ship all-water because we were opposed to water shipments. It was an entirely new idea and we were afraid of having sugar arrive dirty and damaged. The 2 or 3 experiments we made were most unsatisfactory. Furthermore, 1 or 2 raw sugar steamers were usually unloading at our premises and since the water frontage was small there was no room for barges. It became obvious that if we did not do something about it we would be maneuvered out of the entire market.

Arbuckle used the zoning system in the distribution of its coffee. Under our coffee zone plan the freight charges throughout each of our 3 zones are exactly the same for each point within the same zone. The price in each zone includes the transportation charge. The scheme was not definitely taken up with the Institute with my knowledge. I know in a general way that it did come up, but not in my [fol. 1287] presence, and I did not ask to have it taken up. I believe it came to Judge Ballou's attention because I heard he had expressed the opinion that the Institute could do nothing about it. Neither my idea nor anything resembling it has been adopted by the sugar industry, to my knowledge.

My zoning idea was not the same as the delivered prices announced in 1929. It was the antithesis of it. The two have nothing in common at all because the zoning plan contemplates a common price in every market in the zone while

the prices announced at the several lake ports were different.

In the winter of 1928 and the spring of 1929, Arbuckle was considering how to recover the business which it had lost. We began making studies of the various rates which we had heard had been quoted. There were rumors and suspicions of private rates being given to large buyers. At that time, or possibly later, chartering came in. It was a gradual growth.

We concluded that to get any business there, we would probably have to name openly the lowest rate available and that meant the barge rate. We would have to offer the rate whether or not we could get the sugar there by water. There was a difficulty in always securing boats and [fol. 1288] also our great objection to shipping by water. We took the bull by the horns and named a price effective at each of the lake ports, inclusive of freight, and announced that we would offer that price regardless of the routing.

We reached the conclusion that we would break down the freight applications at canal and lake ports a few weeks before our announcement went out. We did not follow Great Western's announcement of April 22, 1929, breaking the freight application at Milwaukee and the Chicago switching district (Exhibits 290-B, 281 and A-5). Our announcements, according to the dates, came out two days later and we went further than Great Western did. Great Western announced prices at 2 points and ours covered 9. Cincinnati was put on our announcement because it was in the same situation as the lake ports. It had a barge transportation rate from New Orleans and we did not have any way to meet that all-water rate.

We did not consult with our competitors or any representative of the Institute before taking the action of April 24. Two refiners, Pennsylvania and McCahan, followed us. The announcement was not a success from our viewpoint. It did not bring us all the business we hoped and it aroused a [fol. 1289] little dissatisfaction on the part of some of the trade located inland from the ports who wanted to know immediately if the rates would be applied inland. My announcement was in the nature of an experiment and it did not work very well. The inland trade, back of the ports, was interested in the announcement because sugar might be

shipped to a port and transported from the lake port to a point inland at less than the customary freight application for a direct shipment from the refinery to the inland point. A customer at Buffalo had a very much lower freight application than a customer inland from Buffalo. I do not think we gave this consideration full weight before making our announcement.

A few days later American came out with an announcement (Exhibit 455-B). We followed American's announcement because it was a step towards straightening out the situation and reduced the absorptions which our announcements caused. We did not feel that it would entirely solve our difficulties of water transportation. We might still have difficulty in obtaining the facilities that were available to others.

Later Arbuckle made other delivered price announcements. I am the one in the organization who decided after consulta-
[fol. 1290] tion with associates, on making delivered price announcements. We did not consult with any competitor or representative of the Institute before making the delivered price announcement. No competitor or representative of the Institute ever consulted with me about making one. We never have advance notice of a delivered price announcement of a competitor nor do we give a competitor or the Institute any advance notice of any of ours.

After the announcement of April 30, 1929, our business increased a little at the lake ports but did not bring us any where near back to the 1927 levels. Carling, our traffic manager, and I and sometimes Cody of the sales office, discussed a scheme to get more business at these points. The talk went on almost all the time from April, 1929, to May, 1931.

We started to devise a plan in the fall of 1930 for a thorough survey of the trucking situation and water rates with the idea of naming a price at nearly all the markets in which we were doing business in a radius of 125 or 150 miles. Our idea was to get more business. We planned a new setup of freight applications for the ports and territories back of them. We had one man, Carroll, who devoted most of his time to collecting all available statistical information on
[fol. 1291] water and trucking rates. We finished our preliminary investigation in January, 1931, and shortly before its date of issue, May 5, 1931, decided to make the announcement (Exhibit D-5). We had the facts and figures before

us for several months before it went out. We did not discuss this announcement with any of our competitors or any Institute representative before making it. Any advantage in this would lie in its surprise. This announcement of May 5 was not in any way affected by the filing of the Government's suit. We had conferences in our organization about the announcement before it was made.

We did not follow the announcement of American and other refiners made between November 24 and December 21, 1931, (Exhibit H-5) and they withdrew their announcements. We did not follow because of merchandising reasons. Arbuckle had taken the lead in establishing these prices and it seemed to be a good thing to maintain them throughout the year even during the period of closed water transportation. It is disturbing to change the price basis from time to time. I and my associates decided it would not be followed. We never considered the pendency of this suit in connection with the question of whether or not we would follow the announcement.

[fol. 1292] The figures in Exhibit U-4, showing the total shipments on the C. A. T. Line by refiners, are true and correct. Our shipments decreased very sharply from 1926 to 1928 and in 1931 rose about to the 1926 level because the C. A. T. Line served a section of the country in which we were not always active. It is partly due to the price guaranty prevailing in that part of the country served by this Line and when we are not guaranteeing we are usually doing no business. We are in and out and since April 1930 we began offering guaranty contracts in that section and that is why the business increased. We were not guaranteeing any shipments by any route whatsoever in the years 1926 to 1929. We started in the spring of 1930.

Cross-examination.

By Mr. Rice:

We made our announcement of May 5, 1931 to get more business. I was convinced that the only way to get business in that territory was to name a low price, inclusive of transportation. We thought that the rates being offered in that territory were lower than the regular rail-and-lake rates, which were the standard rates. Furthermore, by May 1931 the charters had come in and 2 brokers seemed to

be in control of a number of vessels. Large quantities of sugar were going out but we did not know the rate. We [fol. 1293] figured that the only way to find out was to name a rate which was low enough to interest purchasers in our product.

We all followed American's announcement of April 29 and 30, 1929. They went a step further and announced they would not ship f.o.b. New York and we followed these announcements until our announcement of May 5, 1931.

Arbuckle made the announcement of May 5, 1931, because we suspected our competitors were deviating from their delivered price announcements. There was that suspicion and also the knowledge that brokers and others were making rates which we would have to meet some way. We worked months before making the announcement. We began in November of the year before, collecting our information and getting ready to use it at the opening of navigation.

The zoning plan was also considered by Cody and Place and discussed by my competitors. We never got so far as to construct proposed zones. Our theory was that the zones nearest the refinery point should have the lowest rate. Nobody, even in the coffee business, hopes to have one com- [fol. 1294] mon zone throughout the United States. My ideal would be one price throughout the United States for sugar, flour and other commodities. Under the zoning plan I would not give the manufacturer located right near the refinery point the natural advantage of his geographical position. The idea of the zoning plan is to enable the manufacturer to break even on his freight.

The delivered price system remedied difficulties because it made the announced price and terms, which were not clear before, clear to everybody. That is its principle advantage, but that is not all it did. In dollars and cents it saved Arbuckle a lot of money by reducing freight absorptions. The delivered price system was designed to reduce freight absorptions. I did not design any zone scheme for sugar and never got anywhere near it—any further than talking it over with our own traffic manager and Cody of our sales department. I did not talk to any competitors about the zoning scheme and do not know what they thought about it. I have been informed that it had been discussed at an Insfitute meeting at which I was not present.

I thought the zoning plan would create the most ideal system of distribution I know of. It would equalize the freight absorptions to the point where you broke even and had no absorptions.

Redirect examination.

By Mr. Browning:

There were quite a few conferences during March and April, 1931, with my associates before making the May 5 and 6 announcements. Alleged violations of open announcements by competitors were discussed at such conferences. The alleged violations were almost the only factor in determining our action.

[fol. 1295] Recross-examination.

By Mr. Rice:

A few days before the announcement of May 5, 1931 I had conferences with my associates. The final conference, at which Cody, Arling, Lyon and Blackburn were present, took place a few days before we released the announcement.

Redirect examination.

By Mr. Browning:

At the conference with Lyon and Blackburn I discussed whether the announcement would get Arbuckle more business. The thing looked a little vague to me so I asked Blackburn, who was also our chief accountant, to make a very careful study of the plan, facts and figures that had been collected on the subject and be able to tell me at a final conference what it would cost Arbuckle if the announcement were carried through. He said $80,000. I asked Cody how much additional business it would bring and he said about 800,000 bags. All present agreed it was worth while to sacrifice $80,000 to sell 800,000 bags of sugar so I authorized the announcement although I did not fully understand the situation.

[fol. 1296] LOUIS V. PLACE, JR., was called as a witness on behalf of the defendants.

Direct examination

By Mr. Browning:

I have been vice-president of W. J. McCahan Sugar Refining & Molasses Company since 1923. I am in charge of all activities of the company except production and raw sugar purchases. I have been a director of the Institute since 1928 when the system of 2 directors to each company was inaugurated. I am vice-chairman of the Executive Committee. I have attended most of the meetings of the board of directors and of the original Executive Committee, of which I was not a member, but which I attended as substitute for Rionda, and I have attended practically all the present Executive Committee meetings.

For a long period of years McCahan had never absorbed any freight because we sold all of our sugar f.o.b. refinery until the middle of 1927. Prior to 1927 our sales efforts were limited to a territory where the Philadelphia rate was the prevailing application. Then we started to go beyond that territory and have since been absorbing freight.

Prior to the formation of the Institute there were very [fol. 1297] few changes in freight applications. The only ones occurred when there was an actual change in rates quoted by carriers and at such times we would communicate with the brokers interested and depend upon them to inform the trade. Since the formation of the Institute our freight applications have been sent to our entire mailing list. The particularly important announcements were telegraphed to the brokers directly interested. In either case, a copy is sent to the Institute at the same time it is to others.

In the vast majority of cases, announcements are effective immediately. In a few cases they have been made retroactive. A very small number were made effective in the future because there was a contemplated change of actual freight rates on the part of the carriers, of which we and everybody else had notice, and our announcement was made merely to let our trade know that there was a change impending.

The Code transportation principle affected McCahan very badly. We only had 2 differential routes available

from Philadelphia and they were practically 1 route. One was rail-and-lake and the other ocean-and-rail. The rates [fol. 1298] were exactly the same. They were quoted "standard differential routes" whereas most of our competitors had a great number of differential routes available with lower rates. I argued against the principle in 1928 on every occasion, trying to convince the other members and Judge Ballou that as a practical matter it would not work.

I heard the discussion of delivered prices at the Institute. I brought up the subject and kept discussing it on every occasion I possibly could until July, 1928, when the matter was submitted to Sullivan & Cromwell who expressed the opinion that the Institute could not take action on it. Then it was dropped as far as Institute discussions were concerned.

I brought up Goetzinger's zoning plan at an Institute meeting in November, 1928. I argued that it differed entirely from the one that had been condemned by Sullivan & Cromwell and stated that it was in use in other industries. Originally, Cody had shown me plans about it. I talked about it in order to convince those present that it should receive some consideration. Judge Ballou was instructed to look into it. I talked with Judge Ballou after the meeting and over a period of days until he told me that it was, [fol. 1299] so far as the language was concerned, no different from the delivered prices which had been frowned upon by Sullivan & Cromwell and I dropped it. He said he could not discuss it as an Institute matter and the plan was never adopted.

In the spring of 1929 we were in very bad shape in regard to transportation matters. Around the middle of March we became convinced that National had quoted all-water rates for delivery to buyers along the Great Lakes, not on an f.o.b. basis, but guaranteeing that they would get sugar to them on the contracts which were being entered at that time, at the lowest rate that any competitor of any customer could get on all-water transportation. In some cases they had quoted specific rates that were lower than anything we had any idea was available.

I did not know when they did it. It probably had been done for some 2 or 3 weeks before we got a suspicion of it. We told them we thought that any such offer made to buyers without open announcements was in violation of the Code

of Ethics. We did not know of any carrier's rates being quoted that were as low as the freight applications National had offered. Bruyn or Raymond of National said it was necessary for them to work in this way to meet the competi-[fol. 1300] tion of Edgar. I was present at the meeting of March 8, 1929, and there was a discussion as to the effect of these differential movements on the cost of sugar to a buyer at destination. There was no discussion regarding "delivered prices" in the sense of no f.o.b. shipments. The first time I heard "delivered prices" referred to, in the sense in which they are now using it, was when American's announcement was made.

The minutes of the meeting of April 4 containing a paragraph which reads:

"Selling Rate applying to Chartered Boat Movements: The question of water rates that would probably apply on chartered boat movements with the opening of lake traffic to various Northeast and Midwest destinations was discussed. The Vice-Secretary was instructed to make inquiry concerning the matter and report to the members."

That refers to instructions given to the vice-secretary to learn what Edgar's freight application would be on sugar shipped by the barges which he had chartered.

(Defendants' counsel referred to Exhibit 457-O-3.)

We were informed by Judge Ballou that Edgar had telephoned him and said that he preferred to discuss the matter with the refiners themselves at a meeting and Judge Ballou told us at the meeting of April 11 that Edgar would be in town the next day. There was a meeting with Edgar on [fol. 1301] April 12.

Raymond of National, Ripley of American, Carling of Arbuckle, Kirschbaum of Spreckels and a representative of Pennsylvania were present.

Raymond asked Edgar what freight applications he was going to make on sugars sold by refiners on f. o. b. terms over the barges which Edgar had chartered. Edgar started to discuss what he thought the proper freight applications would be and Raymond said he was not interested in that. He said he wanted to know what the actual lowest carriers' rates would be so that he could meet that lowest carrier's rates on his freight applications for all-water

movement. He said National wanted to meet the lowest rate, that they wanted to serve the buyer and that they were not interested in making a profit on transportation. Edgar asked him if it was not a traffic manager's job to make a profit for the refiner and Raymond said it was not.

Raymond's ideas coincided with mine and I said that McCahan was going to meet the lowest carrier's rate that we knew of on our all-water movement from Philadelphia and that if we were not able to obtain bottoms for such water movement, we would ship by the all-water rate by [fol. 1302] the lowest cost route available to us. The meeting broke up and Edgar left.

A meeting was called for the following Tuesday, April 16, which I attended. It was held at the Institute. Practically the same persons were there except that Bruyn was there instead of Raymond. The meeting was very short. We did not obtain the information we wanted from Edgar, which was that he should openly announce the freight application on his barge movement. We stated the lowest carrier's rate we knew of. Each man told what rates he had been able to secure from the carriers. Nothing else was done at the meeting. I made practically the same statement that I made on April 12.

I was at the meeting of the Executive Committee on April 18 and repeated the statement made at the April 16 meeting. We had to ship at the low all-water rate but in order to retain our business in the markets affected we had to ship by other than all-water routes because there were no bottoms available and also because our refinery was not equipped for all-water shipments. We had no facilities for taking the refined sugar to the warehouse and loading it into barges or steamers.

[fol. 1303] The declaration by McCahan that it would ship at a low rate and over a better service would affect our competitors because we would be giving a better service than they were — but at the same rate.

In the second paragraph of Exhibit 457-Q-3 the words

"We have therefore decided that (in accordance with my statements at recent meetings of the Institute) we shall, etc."

refers to the meetings of April 12, 16 and 18. The final paragraph of the letter,

"I trust you will find all of these arrangements to be in accordance with our understandings at the meetings held at the Institute both last week and this week"

refers to the same thing. These understandings were really not any understandings. I made the statement and they could take it or leave it. In the letter I said everybody had agreed but as a matter of fact they had not. I was trying to smooth things over.

[fol. 1304] The Court: How did you come to write the letter at all?

The Witness: They were the active heads of the companies located in New York.

The Court: But how did you come to advise them of what you were going to do?

The Witness: It was in the form of an open announcement.

The Court: Was it?

The Witness: Yes, except that——

The Court: Just a moment, that interests me very much. Will you now explain just what you mean by "open announcement"? Do you mean, to notify your competitors, is that what you mean by "open announcement"?

The Witness: And a copy of this was sent to our brokers in the area affected.

The Court: You notified your competitors first though?

The Witness: No, as a matter of fact, here I say, "We shall next week ship over the rail-lake route at the customer's request"—in other words, we had the orders in hand already and we told our brokers that we would do this.

[fol. 1305] The Court: Had you made any open public announcement? If so, where was it, what was it, and to whom was it made, before you wrote this letter to your competitors?

The Witness: We told our broker he would be able to solicit orders on this basis.

The Court: Is that the way in which you always made your open announcements, by telling one of your brokers that is what you were going to do? So far in this case, I have understood open announcements to be something totally different. I had understood an open announcement to be a posting up of an announcement and a general distribution of the news to all concerned without, in advance, notifying competitors, or indeed, without notifying competitors at all.

The Witness: Precisely, your Honor.

The Court: But this seems to me to be a deviation.

The Witness: In this case we——

The Court: Deviated from the practice?

The Witness: We solicited the orders before making the announcement, and having the orders in hand, we decided to make the open announcement.

The Court: You mean you solicited from the entire world or from certain specific customers?

[fol. 1306] The Witness: No, from everybody in Chicago.

The Court: How did you solicit from everybody in Chicago?

The Witness: We told our broker that he could solicit from everybody there, and he did.

The Court: That is, you don't know whether he did or not?

The Witness: Well, judging by the orders, I should say that he did.

The Court: There are lots of wholesale grocery houses in Chicago, and they do not all buy from you ordinarily. I don't suppose he called upon every one of them, did he?

The Witness: I believe he did.

The Court: All manufacturers and candy stores in Chicago?

The Witness: I believe he did. He was offering something better than any of his competitors were offering, and he was out for business. We authorized him to solicit it before we announced it; in that respect we deviated from the regular practice; we thought something had to be done.

The Court: So you notified your competitors?

The Witness: Instead of making the formal announcement the way we ordinarily did, which would not permit [fol. 1307] us to give the reasons for it.

The Court: Could you not make the formal open announcement without giving the reason for it? Is there anything in the Code of Ethics that deterred you from doing it?

The Witness: No, nothing in the Code of Ethics.

The Court: Is there anything in the Code of Ethics which deterred you from notifying these people without making the open announcement, other than the open announcement you made telling your Chicago broker to solicit the trade?

The Witness: I say a copy of this letter was sent to our broker.

The Court: Yes, after it was sent to your competitors.

The Witness: No, at the same time, in the same mail.

The Court: That is, it was sent to your broker in Chicago in the same mail, as the notice sent to your competitors?

The Witness: Yes.

The Court: Of course, these people got it first?

The Witness: Yes.

By Mr. Browning:

[fol. 1308] This is the only occasion on which I wrote to competitors at the time of making an announcement. We had a regular system of making announcements and they were numbered. Though I said there was an understanding, there really was none.

The action described in Exhibit 457-Q-3 did more than put us in a competitive position in the Chicago market. It gave us the lowest rate available to any competitor or any customer and gave us very much better service.

Between April 20 and 22, when Great Western made its announcement, we had not taken any action though we were contemplating breaking down the freight application throughout the Great Lakes area. I had no advance notice [fol. 1309] of Great Western's announcement until it reached me in the regular course of business. I did not have any advance notice of Arbuckle's announcement of May 24 before it reached me in the regular course of business. We followed both of these announcements. There was nothing else for us to do. We did not have any advance notice of American's announcement of April 29. We gladly followed American's announcement which solved most of the problems which had been confronting us for a year and a half.

We tried further quite a number of delivered price announcements. Most of them came to naught and some we had to withdraw because they were not followed. I recall our revocation on April 4 of the March 15 announcement (Exhibit C-5). We did so because other refiners had not followed it. We led in the withdrawal of announcements contained in Exhibit E-5 because they had not been

followed by all the other refiners and the buying movement was impending. We announced the withdrawal of delivered prices for Wisconsin and Minnesota (Exhibit F-5) for the same reasons. It had not been followed by all of our competitors and of course we could not maintain our delivered prices which had not been followed.

McCahan did not have freight profits under delivered [fol. 1310] prices at the canal and lake ports. In practically every case delivered prices were lower than our actual cost of transportation.

I never discussed with any competitor any of our delivered price announcements before making them. I never asked a competitor to announce, maintain or withdraw a delivered price. No competitor ever made such a request of me. No Institute representative ever asked me to announce, maintain or withdraw a delivered price. On every possible occasion I advocated the principle of delivered prices. In those discussions it was entirely principle, not points, that I was advocating. I would like to have seen either the zoning plan or delivered prices throughout the country. Economically, I think it is the only way to sell.

I never refused to do business with anyone because he either transited or diverted to defeat our freight application. I know of no case where any refiner has done so.

We always used trucks in the metropolitan area of Philadelphia but it was not until 1930 that trucking became of any importance. In that year we started dealing with truck operators for the transportation of sugar to points outside of Philadelphia. Previously truck shipments from our re- [fol. 1311] finery had been entirely at customer's request. About the only thing that was available in that field were small operators who had at the most 2 or 3 trucks. Usually they were not financially responsible and were under the control of no governmental body, such as the Interstate Commerce Commission.

(Defendants' counsel read Code Interpretations (a), (b) and (c) in XII-2 under the general heading "Truck Transportation.")

I was present at the adjourned meeting of March 4, 1930, at which we adopted resolutions (a) and (c). Regarding clause (a) of the Code, it was stated that if a buyer's truck-

ing organization was used, there was a discrimination in favor of the buyer because he kept his trucks busy when the trucks of other buyers were not busy. That discriminated in his favor and furthermore made it very difficult for refiners to check just when and where deliveries were made. This clause also deals with the affiliation between a broker and a truckman. It was stated that the refiner usually depended upon the broker to make the arrangements for the trucking of sugar. We have a contract with a trucking concern for our metropolitan deliveries but know nothing of truckmen who make scattered deliveries. A broker will come in and say he has an order for Allentown [fol. 1312] and a good truck and if they are affiliated we are simply at the mercy of the broker. The brokers get the rate for us from the truckman.

The affiliation between warehousemen and truckmen does not come up very often but it was felt that when we delivered sugar from the warehouse to the buyer we depend upon the trucking concern to tell us when the sugar has left the warehouse and we depend on the warehouse to tell us when the sugar is delivered to the trucking concern so that we can compare the same. In the same manner, when we are trucking sugar to a warehouse, we are depending on it and on the truckman to give us the date on which the sugar arrived so that we can check our storage bill, etc. We used one as a check on the other and if they were both in the same organization we did not have that check. We were not concerned with the warehouseman affiliated with the truckman if he was acting for a customer. As a matter of fact, most warehouses do trucking for customers. We had in mind the instances of warehouses trucking for the refiners' account and storing for the refiners' account at the same time.

Code Interpretation VI-13 deals with the situation concerning trucking by warehousemen. Clause (c) was [fol. 1313] adopted as a specific application of the principle of open announcements but there had been some discussion at that time about some deliveries made by New York refiners to Hudson River points where the deliveries were made by truck. The application announced was applied, but a different kind of service was rendered, and it was felt that it should be openly announced as part of the terms.

Defendants' Exhibit R-5 was received in evidence.

I was present at the meeting of the Executive Committee of February 13, 1931. This meeting was held because there had been complaints of irregularities in trucking deliveries. They were discussed at the meeting. McCahan has never refused to do any business with any truckman or any other carrier on account of any Institute recommendation.

Some of Exhibits 248 to 254, inclusive, and 457-E-3 to N-3, inclusive, are duplicates. I initiated the correspondence contained in these Exhibits, dealing with the situation in the small C. F. A. territory in West Virginia and Kentucky. The whole matter arose from a very insignificant situation. The situation was that we were not selling in accordance with our announcement, and we knew that American was not selling in accordance with its announcement, because we knew that it was the historic policy of American not to apply the Baltimore rate in C. F. A. territory. We were very glad, of course, to follow that policy. [fol. 1314] Only the northern tip of West Virginia and the northeastern tip of Kentucky were involved in this correspondence. I knew that the announcements did not agree with the practice and I wanted to draw attention to the fact and when I failed to get action on it I became quite peeved. In the area involved we had not sold a pound of sugar up to that time and have not sold any since. Our action in taking it up with the Institute in the first instance was in the nature of reporting to it that the announcement was wrong; that the practice did not agree with the announcement. I went to American subsequently because I could not get any action out of the Institute. As I say in one of the letters, the "wheels of gods move slowly." When the announcement was finally cleared up it did not have any effect on our sales in that territory. We try to sell there now but we don't.

I wrote Exhibit 254 because there was a rumor that American was contemplating making an announcement breaking the rate at Norfolk in order to meet our competition. I did not want any misunderstanding of that situation to occur so I sent a telegram to Ripley, which is quoted in this letter. At the same time I advised the Institute, so if it received any inquiries on the subject it would have an answer. In the last sentence in the letter I said "This may be a splendid opportunity to spread 'delivered prices'

[fol. 1315] to this section of the country" because I was really following out the idea that I was trying to promote on every occasion. I threw it in here more as a slogan. I knew the Institute could not do anything about it.

I remember the situation dealt with in Exhibit 326 and 326-A. The incident itself, so far as this particular time was concerned, dealt only with the correctness of the freight selling lists and whether the book of compilation of announcements correctly interpreted our practice. It referred to a situation in 1928. When the Code Interpretation not to sell below the cost of transportation was first brought out by Judge Ballou I felt that our only hope was to interpret it strictly as stated. In other words, if the refiner was to sell at the actual cost of the route over which he shipped that meant McCahan would have a rate over the differential route or standard differential route 2¢ lower than New York. That is, there was the same difference between our lake-and-rail and the New York lake-and-rail and our ocean-and-rail and the New York ocean-and-rail as there was between the New York all-rail and our all-rail. I tried to sell the idea to Judge Ballou and to convince him of that on several occasions but it didn't [fol. 1316] do any good because New York refiners said immediately they would absorb the rate on differential shipments to meet the rate from the same differential route from Philadelphia. That is, since they on an all-rail shipment met our all-rail route, which was lower, they would likewise absorb on their New York lake-and-rail shipment to meet our Philadelphia lake-and-rail.

This annoyed me considerably and I decided to try to get back at them in some way. I wrote a letter to Judge Ballou at that time in which I indicated that McCahan would ship over the ocean-and-rail route and meet the National Despatch rate from New York, which was 2¢ lower than our Philadelphia ocean-and-rail. I was really hoping at the time that I would be picked up on it for what I considered a breach of the cost of transportation theory. However, nothing was done about it and it was not until 1930, when this technicality came up as to the freight selling list, that the subject was aired.

Lowe, as shown in that Exhibit, questioned the correctness of the freight selling list. He was right. We were shipping over the ocean-and-rail route and invoicing at the

National Despatch rate. At that time I tried to bring the situation back to 1928. I was hoping somebody would say that I had not any right to do this and I was going to flash my letter on Judge Ballou as evidence of the fact I had not put anything over. As a matter of fact they did not do that. [fol. 1317] The matter was mentioned at 2 meetings and the only question involved was whether we had or had not made an announcement of our practice. I thought we had not but I was hoping that they would criticize it. They did not. The New York refiners immediately met our competition as far as they could and shortly thereafter the whole Michigan territory was brought down to the National Despatch application.

Cross-examination.

By Mr. Fly:

When I said the discussions of delivered prices had ended after Cummings' opinion in the summer of 1928 I did not mean that I stopped preaching the doctrine. The sentence

"This might be a splendid opportunity to spread delivered prices to this section of the country"

in Exhibit 254 referred to delivered prices as we understand them at the present time. My whole theory was to see delivered prices spread, not as individual rates to particular points but to every point in the United States.

Petitioner's Exhibit 474 was received in evidence.

I was referring to delivered prices in Exhibit 474. You will notice in this letter I say "your thought of quoting delivered prices." I think it is evident to everybody that [fol. 1318] it was my thought right along. Here I am trying to sell Moog the idea that he is the one who is advancing the idea.

There were other letters which I wrote to Moog to try to put him in the position of championing delivered prices, based on a chance remark he had made.

As I recall there were a number of representatives of the New York and southern refiners who had New York offices who were referred to in Exhibit 457-C. There was a fairly large gathering. I remember specifically George

E. Keiser and Judge Ballou were present. There were a lot of persons present who were not members or directors of the Institute, for example, Fox, our broker, and traffic managers and brokers of other refiners. Exhibit 457-E-2 is a memorandum which I read at a meeting on October 11, 1928. I wanted a general plan, something that could be constructive, something along the lines of delivered prices for the whole United States.

Not all of the private charters to the Midwest in the spring of 1929 were f. o. b. shipments. The ones who were giving us the chief trouble were those for whom National was guaranteeing to lay down the sugar at a cheap rate, giving whatever service they could obtain. In addition to [fol. 1319] that we had a number of f. o. b. shipments to customers. At that time National was selling to everybody and anybody. At the meeting of April 12 Edgar wanted to discuss freight applications. All we wanted to know was what it would cost us. At the time of that meeting and the meetings of April 16 and 18 I stated we would follow National's lead.

Exhibit 457-Q-3 was not sent to the high executives of the companies which were represented at those meetings but to the heads of the selling departments.

The Executive Committee was composed of New York and Philadelphia refiners. I sent Exhibit 457-Q-3 to New York refiners, the ones who were interested in water transportation. The letter of April 20 states that "we have the orders and are going to ship them." McCahan started soliciting orders around the end of March when we learned what National was doing. We were determined to do the same thing. We did not actually quote a rate until after the meeting of April 16 when we told them we would meet competition by shipments over the rail-and-lake route. In other words, the other refiners had a general proposition at that time and after these 2 meetings I told them more specifically what the rate would be.

[fol. 1320] I cannot tell whether Cody in his zoning plan was advocating the coffee plan or the alcohol plan because I don't know what the plans really are. As far as the Arbuckle plan is concerned, the way it was explained to me by Cody and the way we evolved it together, was to take an area, try to find natural boundaries, such as mountain ranges, rivers or something of that kind and put all the

trading markets in that area in one class. We never discussed what rates would apply to that zone.

The Executive Committee meeting of April 28, 1929, contains the following:

"Several members announced their intention of meeting the competition caused by the announcement of arrival terms on all-water shipments in the territory taking rail-and-lake selling basis."

At that time Godchaux announced arrival terms on barge shipments into the midwest territory where the freight applications were rail-and-lake. Any differential rate of course was causing a disturbance and the particular rates which were uppermost in everybody's mind at this time were the all-water rates from the East. It was at this time that National stated they were meeting secret competition.

The second paragraph on that page refers to a different [fol. 1321] subject. The subject by itself was merely an announcement by New York refiners on all-water shipments and they were planning arrival terms. I was just reading into that last paragraph that it related to the arrival terms from my own memory of the fact that National did make that announcement.

At the meeting of April 4 National was again questioned regarding their lack of open announcements and they stated that they had the intention of meeting the competition established by Edgar on f. o. b. shipments. It was decided that we should attempt to find out what those rates were in accordance with the plan of open announcements and it was after that that a letter was written to Edgar requesting him to openly announce the application that he intended to charge on f. o. b. sales that he made for refiners.

At the meeting of April 16 I stated in effect that we would do the same thing that National had been doing and meet the lowest rate by any all-water carrier and that we would ship cargo quantities by any route available to us. If possible, it would be an all-water movement, if not, it would be any other movement that we could secure, and that we would make that [fol. 1322] meet that lowest all-water rate quoted by any carrier.

I did not state that Exhibit 457-Q-3 was the only occasion I took up with my competitors in advance the question of maintaining or changing rates. If it reads that way it is

wrong. I do not recall any instance where competitors took up with me the rates they proposed to put into effect or to continue to maintain. National told us they were going to meet the lowest rate quoted by any water carrier and they told us what their knowledge was of the lowest quoted rate at that time. I do not recall any other instance at the present time of a proposed application of a refiner being up for discussion. In Exhibit 457-D I was merely trying to sell my idea to Judge Ballou. I told him what I thought would be done. I had no knowledge of what would be done. That was my belief of what would happen under such circumstances.

Referring to Exhibit 457-C-2, everybody knew that American had not and would not sell f. o. b. Baltimore. It was no secret. That has been their practice since their plant was built. I think they stated very freely that their intention had been to make that freight pick-up.

Referring to my prior testimony, concerning Exhibit 457-Q-3, what I had reference to was that I had not taken it up [fol. 1323] with my competitors. I had made the statement. It is the only instance that I know of that we made a freight change other than by open announcement.

After making for the first time my statement at the meeting of April 12 about quoting all-water rates in the Midwest, I said nothing more than we would meet competition the same as National was. At the meeting of April 16 I went into a little more detail and announced the definite policy of shipping by any route available. At the meeting of April 18 there was no discussion about it. I made the statement that that was going to be our policy. I repeated it at the meeting of April 18 because there were persons present who had not been present at the meeting of April 16. I thought that was a departure from our practice and I wanted everybody to know about it. It was announced to those interested in Chicago though I admit that this was a case where we did not follow our usual practice of open announcements.

Redirect examination.

By Mr. Browning:

In my letter of March 31 to Rionda, Exhibit 457-C, I said:

"Both Mr. Fox and I believe that the purpose of this meeting was to agree to sell in these markets on a uniform

[fol. 1324] delivered quotation (based on the all-rail rate), refusing to sell on an f.o.b. basis for shipment over all differential routes."

It was our hope and I thought at the time, and Fox agreed with me, that that was the only way to conduct business along economic lines and I still believe it. We did not get very far with the idea at the meeting. As a matter of fact the minute I mentioned that it was waived aside. They were not there for that purpose apparently.

This letter had two purposes. One was a report to Rionda, my superior, in which I tried to elaborate our failure to retain the advantages which I thought we were entitled to under Judge Ballou's transportation theory. It was evident at the meeting that we could not sell anybody the idea that we could retain these advantages. We were going to be met and that was all there was to it. However, the main purpose of the letter—you will notice it is initialed by Rionda on the first page—was for presentation to Judge Ballou. As a matter of fact, I drew up a draft of this letter which I presented to Rionda and he made several changes. The second and third pages were completely changed and after he had approved it I took it over to Judge Ballou.

[fol. 1325] I wanted to show him that I thought we had been very magnanimous and had done something we were not called upon to do. As a matter of fact, we did not do anything that was not perfectly proper. Throughout the letter I was talking about what we gave up, but as a matter of fact we did not give up anything. This letter was taken over to Judge Ballou and he kept it in his files.

My memorandum, which was read at the meeting of the Institute's board of directors of October, 1928, (Exhibit 457-C-2) stated:

"Let us have a constructive plan to cover the matter of freight applications throughout the country instead of having haphazard compromises covering individual sections of territory."

Abbott's delivered prices in April, 1929, is not my idea of a constructive plan. We were glad to follow it because it solved our problem in that particular territory but we were disappointed that it did not cover the whole United States instead of just a few particular points.

I did not concentrate my fire on delivered prices on Abbott because American had nothing to gain by it and he would not listen to anything on transportation.

Recross-examination.

By Mr. Fly:

I knew he would not listen because I tried it. He knew that I liked the idea in general.

Redirect examination.

By Mr. Browning:

Exhibit 457-T, a telegram from McCahan to Savannah, dated May 24, 1928, reads:

"For your information at the insistent request Judge Ballou we have this afternoon made the following announcement."

I go on and describe our withdrawal of an announcement [fol. 1326] placing a certain territory in the Midwest on the barge rate and said:

"There is going to be a special meeting of the Executive Committee of the Institute to discuss this matter tomorrow."

Exhibit 457-U, sent May 25 to Pardonner by me, states:

"Meeting today prevailed upon Pennsylvania and McCahan to continue indefinitely the withdrawal of barge rate application western territory."

My letter of June 5 to Pardonner (Exhibit 457-A-1) deals generally with barge competition in the same connection.

These Exhibits refer to an announcement of May 24. This announcement was an episode in the difference of opinion between Judge Ballou and myself regarding his transportation-at-cost theory. It started at the meeting in March. That was covered by my letter to Rionda, which was previously mentioned. At the March meeting Judge Ballou was taking up the matter of payment but solely in connection with the application of his theory. The same is true of my correspondence with Judge Ballou during the first half of April.

The next action which we took was the announcement on May 24 when we broke down a wide territory in the Mid- [fol. 1327] west to the New Orleans barge rate. This was a direct blow at Judge Ballou's transportation-at-cost theory. He telephoned me, stated that this was breaking down his theory and asked me to withdraw the announcement temporarily. He said a meeting would be held the next day at which the matter would be considered. We withdrew it and that is the announcement I quoted in my telegram to Pardonner.

It was my understanding that the meeting of May 25 was to be an Executive Committee meeting but it was not. There was a meeting of anybody who happened to be in New York at the time. Hoodless, Rionda and myself were present. Judge Ballou expanded on what he had told me over the telephone the previous day. The others had very little to say. It was mainly Judge Ballou's fight. He pleaded with me to give his theory a trial. He said it was too early in the life of the Institute to throw overboard such an important theory without giving it consideration and that we should wait until statistics showed whether or not our fears were well grounded. Somebody suggested that our loss of business in this territory was due not so much to our handicap in the freight rate as it was due to our handicap in not quoting the same guaranty that was quoted [fol. 1328] by the Pacific Coast refiners.

I argued against this as much as I could but finally said we would make our temporary withdrawal permanent until further notice. After the meeting we did nothing. We waited to see what the statistics would show. It worked out poorly for McCahan. I think now our loss of business in that year was due mainly to the lack of guaranty rather than to the freight rate. I wrote letters and tried to convince these people that they were wrong, instead of going ahead and breaking it down. My reason was that I was one of the youngest, if not the youngest, of the executives on the board and, though I felt I was right in this particular, I was surprised that the others did not agree with me and I often wondered if I could possibly be right. It was so clear to me that the fact that the others did not agree made me wonder whether there was something which I did not understand, especially when Judge Ballou, a man experienced in transportation matters, took such a different view of the situation.

Hoodless, who should have felt the same as I did on the matter, because he was located at Philadelphia, did not really give me any active support. Rionda and I were trying [fol. 1329] to convince the other members and especially Judge Ballou that the transportation-at-cost theory was wrong. We were trying to get an affirmative action on the part of the Institute and we never got it.

Judge Ballou never told me during this period that I could not break down the rate. As a matter of fact he told me on several occasions that of course I could do what I wanted but he pleaded with me not to, to give his theory of transportation-at-cost a trial and to await the statistics.

In April, 1929, we broke down the rate. National's action gave us an occasion to do so. I made the speech, a copy of which was enclosed with my letter to Judge Ballou of May 26 (Exhibit 457-U-3), on May 10. The meeting of May 25 was a very short affair. No action was taken. It was just a very short meeting at which the same arguments were made. The remedy, referred to in paragraph 11 of my speech, was for the refiners who were losing the business to go after the man who was getting too much business, by cutting the freight applications and naturally the refiner having the lowest cost routes would win out in such a fight. [fol. 1330] I wrote to Savannah in regard to this opposition of mine to the Code transportation principle, but Savannah did not sell in the same territory that we did. I wrote to them because they were in the same position in other territories and as a matter of fact had already taken the action in other territories which we wanted to take in this territory and I was working for moral support. I was trying to get an ally in my fight.

Re-Cross examination

By Mr. Fly:

My proposal that refiners sell to all points on an equal freight application was not adopted. Hoodless attended the meeting of May 25. He also withdrew his announcement the day before. There were very few persons present at the May 25 meeting and I was surprised, as stated in my letter to Savannah. I had expected an Executive Committee meeting and there were only 2 or 3 persons present. The minutes contain no reference to the meeting of the 25th. There

was no action taken except that Pennsylvania and my company were prevailed upon by the arguments which were made by Judge Ballou to continue indefinitely the withdrawal of the barge rate application. I was disappointed and expected to bring the thing up again. I brought it up on 2 or 3 occasions, whenever a suitable opportunity presented itself.

I do not recall that Hoodless brought up the barge rate [fol. 1331] situation at the Executive meeting of May 29, though he may have. I received copies of all the minutes and undoubtedly I was aware that the barge rate situation came up for discussion. The discussion at the meeting of June 14, 1928 was prior to the opinion rendered by Sullivan & Cromwell. Apparently that was the outcome of Hoodless' comment in the preceding Executive Committee meeting.

Exhibit 475 refers to the breakdown which destroyed the effect of the meeting in March which I have referred to before. The first message is dated March 28, 1928. The correction is dated April 4, 1928, and circulated by the Institute. This was the breakdown that Judge Ballou was trying to prevent at the March meeting. He used on Western the argument of waiting for statistics that he used on us with success, but it did not work. They said it was too late as they had instructed their brokers to go ahead.

Petitioner's Exhibit 475 was received in evidence.

The meeting to which I referred in Exhibit 475-C, my letter to Rionda, was the one called by Judge Ballou (Exhibit [fol. 1332] 475-A-1). The meeting was caused by Western's determination to break down the arrangement. Judge Ballou tried by means of determining certain payment terms to prevent this breakdown but it occurred just the same. The arrangements regarding payment became useless. As a matter of fact they were ineffective.

The refiners determined they would not give arrival terms on rail-and-lake shipments. It was a new situation because there never had been rail-and-lake shipments in that territory invoiced at a higher rate. At the meeting of March 29 it was decided that we would apply the terms of 10 days after shipment to such rail-and-lake shipments and that is what I was referring to in my letter to Rionda as the big concession which we had made. As a matter of fact it was

not very much of a concession. It was the natural payment terms to apply but subsequently when the application broke down to the rail-and-lake rate the arrival terms applied and the results of the meeting of March 29 were nullified. By "subsequently" I mean as shown in this last Exhibit.

In April, Western proceeded to break down the rate structure. It started with the Twin Cities and Chicago. It [fol. 1333] spread to the rest of the Great Lakes region and during the summer of 1928 it broke down generally throughout the area. During the summer we did not re-instate the announcement which we had withdrawn on May 24. That particular breakdown did not occur, but in the spring of 1929 it broke down to the New York barge rate which was lower than the New Orleans barge rate. The rail-and-lake rate remained in effect, not only during the summer but during the whole winter of 1928 and 1929, which was unusual.

It was my impression that Exhibit 240, my letter to Judge Ballou of April 3, 1929, was not sent to all refiners. I wrote the series of letters to him at that time, all dealing with the matter of my belief as to what would happen, but I could not get any action out of him, either to say that it would happen or that it would not happen. This is the first one of the series.

Exhibit 420-L is an Institute memorandum which was circulated to the 13 directors under date of May 4. No action was taken. Incidentally, where I say "understanding," there again that is a question of my having made a statement and trying to get the rest of them to *to* agree [fol. 1334] with me merely by saying that it was understood.

My letter of April 11, 1928 (Exhibit 237), is a part of the series of letters which I wrote to Judge Ballou trying to define what I thought would happen under certain circumstances. I am sure that there was no understanding in the sense that others agreed to it. I was expressing my theory and wanted Judge Ballou to say "Yes, this is the theory and I will get the other refiners to agree with it," but he never did that. Exhibit 238 is the same thing. I was trying to give my understanding of the situation and trying to get him to affirmatively approve it but he never did.

Exhibit 239, a letter from Judge Ballou to me under date of April 18, states:

"I would like a line drawn in following the suggestions made in your letter of April 17 regarding this territory. It would be appreciated if you would return the map with this line drawn in, at your earliest convenience."

I did not draw in the line on that map. That letter stopped the series of letters immediately. He was asking me to put it down on a map and I could not do it and quit then. Another reason why that series stopped was that by that time it had become an academic question due to the breakdown [fol. 1335] of the rail-and-lake basis.

Pardonner and I were actively corresponding on this subject of the barge rates at that time because we were companions in misery. He was interested in one territory and I in another.

We did not have considerable freight absorptions due to the barge rate in 1927. The applications did not break down to the New Orleans barge rate generally in 1927. I have a vague idea for about a month or 2 during the latter part of the navigation season of that year we met the barge rate. At the close of navigation we went to the rail-and-lake basis and continued thereafter until the latter part of November, 1927, and then we went to the all-rail application.

I believe that the applications all through the South had broken down in the barge rate in 1927. It was just about that time that the barge service to the northern Midwest was greatly improved. Prior to the latter part of 1927 the New Orleans barge service to Chicago and places of that kind was very poor.

I do not believe I ever saw Judge Ballou's telegram of May 2 (Exhibit 457-A) suggesting that refiners guarantee [fol. 1336] against change in freight applications on direct shipments on refiners' own accounts. The thing is quite foolish because refiners have always guaranteed their freight applications to be the freight application on date of shipment. If there was a suggestion, apparently Judge Ballou made it.

Petitioner's Exhibit 476 was received in evidence.

[fol. 1337] JOHN W. LOWE, JR., was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Browning:

I am connected with the Revere Sugar Refinery. I started with them in December, 1918, as assistant superintendent and became superintendent in charge of operations in 1924. In 1929 I became manager in charge of sales and operations.

The figures shown for Revere in Exhibit U-4 are taken from Revere's books and records kept in the ordinary and regular course of business. Shipments vary rather sharply from year to year because we are at the refining end of the raw sugar operation and when we get too much raw sugar and cannot dispose of refined in our normal markets in New England we send it out over the C. A. T. Line into a market which is not our normal market.

The recommendations of the Institute did not have anything to do with our decision to ship or not to ship by the C. A. T. Line. Revere did not guarantee shipments by any line prior to 1929.

We followed the delivered prices announced for canal and lake ports in April, 1929. We did not have any advance [fol. 1338] notice at any time of any delivered price announcement of any of our competitors. We did not give any competitor or the Institute any advance notice of our own before we made the announcement in the usual way. I never consulted or discussed with any competitor any delivered price announcement before making it. No competitor ever discussed with me such a matter.

We absorbed freight when we sold canal and lake ports under delivered prices. We had to. Our actual freight rate out of Boston is higher than the delivered price application.

Cross-examination.

By Mr. Fly:

Our business with the C. A. T. Line dropped from 34,800 in 1927 to 1,200 in 1928 because we were the refining end

of a large raw sugar operation and we have to take the raw sugar as it is delivered to us on schedule and refine it. When we cannot place all of our refined sugar in our normal markets, we have to go to an abnormal market. We get free storage at Newport and Depot Harbor and I believe that is about the best place that we can put it. They are on the C. A. T. Line. We have the figures here of the amount of sugar which we put into the territory covered by this Line in 1927, 1928 and 1929. I do not know that [fol. 1339] these were C. A. T. Line shipments only. I have not checked them. My offhand opinion is that practically all of the sugar we have sold in this territory was shipped over the C. A. T. Line. I have not checked our figures to find out how much sugar went into that territory, but I would know that is not our normal market and the only reason that we do business in that market is when we are confronted with this physical situation at the refinery. I have not checked the figures as to business during these particular periods in that territory.

Redirect examination.

By Mr. Browning:

I do not recall shipping any sugar on any other line than the C. A. T. Line into this territory. We would not. This was a situation where we were dumping into an outlying market. The 34,800 bags that we shipped in 1927 became hard and we had to sell it below the market.

Recross-examination.

By Mr. Fly:

We did not guarantee prices on sugar shipped over the C. A. T. Line or any other line prior to the latter part of 1930. I knew that other refiners were guaranteeing on other lines and not on the C. A. T. Line in 1928 or 1929. [fol. 1340] There are times when the guaranty has no value and that was the only time in which we could sell sugar. We tried to sell without a guaranty but could not do it. As a general rule, we failed to sell on our terms the sugar we sent out there and had to sell it below the market price because it got hard.

[fol. 1341] Petitioner and Defendants agreed to the following stipulation:

STIPULATION RE TESTIMONY OF MORTON MYERS

"Referring to Defendants' Exhibit U-4, showing the total shipments of refiners by C. A. T. Line, if Morton Myers were called to the witness stand by the defense, he would testify as follows: That he was employed by the Spreckels Sugar Company and its predecessor company, the Federal Sugar Refining Company, from 1918 to 1932, having been in charge of the Shipping Department from 1922 to 1929, and in charge of both the contract and shipping departments from 1929 to 1932; that with reference to this particular exhibit he has personally verified from the books and records of the companies the shipments made by them via the C. A. T. Line for the years indicated, and that the figures shown on the exhibit for those companies are true and correct figures taken from the books and records of the companies kept in the regular course of business."

[fol. 1342] V. K. RAYMOND was called as a witness on behalf of the defendants.

Direct examination.

By Mr. McCollester:

I have been traffic manager of the National Sugar Refining Company since November, 1929. As assistant manager I had active charge of traffic matters for 3 years prior to that time. I have been in the traffic department of National since they took over the B. H. Howell organization, sales representative of National, in 1922.

In the latter part of February, 1929, we received a number of inquiries from brokers and customers, perhaps in most instances from brokers, as to what rates would be available for transportation of sugar via water during the navigation season which usually starts about the first or second week in April. I personally got in touch with the different water transportation companies to find out what their service would be for the year, at what rates cargoes could be handled and to tentatively cover our position so

that I would know that equipment would be available as soon as the canal opened. We had shipped sugar via the canal prior to 1929 and had always been large users of water transportation. I had experience with canal carriers [fol. 1343] and knew what their rates had been in prior seasons. In the spring of 1929 it appeared that it would be particularly important, due to the competitive situation, to have cheap water sugars available and to get shipments out by water as early as possible after the opening of navigation. The most expeditious means of effecting water shipment was the motor ship. In February I got in touch with the only active motor ship company, the Erie-St. Lawrence Corporation. I asked them whether they would have the boats available and whether I could be reasonably sure of space on one of their vessels at the opening of navigation. I was assured in the latter part of February by Urquhart, vice-president of their company, that I could.

Shortly after, I obtained a report to the effect that these vessels had been contracted for and sewed up for the season by Edgar. I called Urquhart and asked him whether that was so and he said it was. He said he had an opportunity to take some firm business and had closed on it. He told me National could not get a boat because they would be busy well on into the season.

I reported that situation to my company and almost im- [fol. 1344] mediately got in touch with McDougal of Duluth to learn on what basis I could arrange more or less exclusive use of his boats for my company for the coming season. Early in March he decided he did not want to operate boats and so we could not count on that means of transportation.

About March 5 there was an advance in the market which was important because it would probably book sugars which would be carried on the canal when it opened. Edgar appeared to have the most desirable and fastest type of transportation tied up. At points on Lake Erie the Erie-St. Lawrence Corporation had quoted lower rates the year before than were available over any of the combination routes, which are canal boats to Buffalo, and transfer to lake steamers for movement beyond.

We were in a position of not being able to properly protect ourselves and of not knowing what rates to offer customers on sugar moving on the motor ships. At that time

Edgar purchased sugars for his account and acted as broker for several refiners. As far as he purchased for his own account and to the extent that he was handling rather large amounts of sugar of other refiners, he was our competitor. He never purchased sugars from us and we thought we [fol. 1345] were at a very disadvantageous position at that time. With this market move pending I called up brokers in Cleveland and Detroit and told them about this situation. I did not know how I could get sugars out there or at what rate our competitors might offer sugars. We wanted our customers to get as low a rate on water shipments as were being offered. I suggested a rate of 21½¢ at Cleveland and 25¢ at Detroit. I told them to advise our customers who took sugar by water that we wanted their business, would protect it and see that they got as attractive a rate as anybody else. I told them I hoped to work out some arrangement to move sugar by water but if I could not that they could assure the customers that the sugar would reach them when they wanted it.

We did not customarily ship to Chicago or Milwaukee by motor ships because they go into Lake Michigan less frequently. We had a satisfactory combination route and rate into Lake Michigan and on the basis of that rate the business from Chicago and Milwaukee was booked in more or less the normal way.

We did not make a public announcement of the pro- [fol. 1346] posal to protect the water rate on shipments to customers on sales made through our Cleveland and Detroit brokers for the reason that we were competing with a factor who had in his hands a form of transportation. What he was paying for it was unknown to us. What rates he might offer for shipment of sugar on those vessels was unknown to us and we felt that the conditions warranted protecting ourselves until we knew more about the situation. I told our brokers to tell customers, who were usually interested in that form of transportation, that these rates would be available.

We met Great Western's announcement at Chicago on April 22, 1929. The Arbuckle announcement of April 24 went further and made material reduction in rates to lake ports other than Chicago and Milwaukee. We considered it rather a drastic revision in freight rates but felt that Arbuckle had one very interesting feature and that was

that they proposed to apply these low rates only to direct shipments. We felt that would result in increasing our direct shipment business and reducing storage expense at lake ports.

While we were considering the question one of the Philadelphia refiners announced that it would meet the Arbuckle [fol. 1347] rates and apply the terms on deliveries from consignment as well as on deliveries from direct shipments. That altered the situation very much and meant that, in addition to taking the big absorptions in freight, which the Arbuckle announcement would require, we would also have the great expense of storage at those ports. We held off doing anything until we discussed the matter among ourselves. We never met the Arbuckle or the Pennsylvania announcement if it was tacked on to the Arbuckle announcement. We followed American's announcement of April 29, 1929, but made some changes. We put in a lower rate at Green Bay, Wisconsin, and Toledo, Ohio, than the rate American put in their announcement, but in all other respects we followed it. Our company was not the first to make any delivered price announcement, either in the canal and Great Lakes territory or in the Warrior River district.

Before American's announcement I did not have any conference with anybody connected with American as to what it was going to do and to the best of my knowledge nobody in our organization did. We did not give American or anybody connected with American or any other refiner [fol. 1348] assurances that if they announced delivered prices on the basis on which they did announce them or on any other basis on which they might announce them, that our company would follow. We did not give any information to a competitor of our intention to announce delivered prices in advance of our own announcement.

In the interval between the time American and Arbuckle made their announcements we had met Western's announcement at Chicago and Milwaukee, but otherwise our selling basis was unchanged. The trade takes for granted that we will meet competition eventually even if we do not promptly make an announcement to that effect. They knew that we had the situation under advisement and assumed that some information would be forthcoming. The offers made to the trade through brokers in connection with pro-

tecting the lowest water rate by whatever method we had to ship, were still outstanding during this period, only in so far as the sugars that were booked on the March 6 move were undelivered. Our offer subsequent to the move of March 5 was not a continuing affair, except that in the future we would develop probably further what the water transportation facilities had to offer. Our brokers were not actually soliciting business after the move of March 5 [fol. 1349] on the basis on which they solicited it according to our instructions for that move. The rate which applied on Chicago and Milwaukee business on March 5 was continued because it was based on the actual transportation charge while the Cleveland and Detroit rates were not permanent.

The refusal to sell f.o.b. refinery was not advantageous to National since we had always used the water routes. We were always actively engaged in shipping our sugars by water and for a number of years asked the water lines in advance of the opening of navigation what ways and means could be worked out for handling shipments to various lake ports at low rates. We passed that information on to our interested brokers and large buyers who were able to handle the quantity necessary to get the rates. During the navigation season we invariably did a very large business at the lake ports.

Our refineries are located only on New York Harbor. We have access to the canal and lake ports and we have other routes out of New York. We were able to offer to buyers, who purchase at our refineries, the advantage of the lower rates via the canal, lake and over differential routes. We compete with refineries which do not have access to [fol. 1350] these differential routes. New York has more differential routes than any other single refining point and we use that as a sales argument. Delivered prices, which placed all routes on the same basis, deprived us of the sales advantage which the water routes hitherto provided.

We followed American's announcement of delivered prices in April 1929 because we felt that the Arbuckle announcement, as modified by Pennsylvania's announcement, almost destroyed the sales advantage of the water routes. It brought the rail shipment rate down almost to the water basis and involved a tremendous absorption and heavy storage expense. It meant that we had nothing unique to offer our buyers which the Philadelphia refiners did not

have in the way of transportation. If the same rate was applied on all routes there was no sales advantage either under the Arbuckle basis of announced rates or the American delivered prices. Since we lost the sales advantage either way, the least expensive way naturally appealed to us and we followed American. We could not go back to the old basis which we preferred, water for water and rail for rail, when competitors were insisting on applying water rates to rail shipments.

[fol. 1351] I attended a meeting of the Institute on April 12, 1929. Edgar, Ripley of American, Carling of Arbuckle, Place and a representative of Federal were present.

I knew that Edgar had gained control of these motor ships and was very anxious to find out at what rate I could afford to offer to deliver sugar by water. I questioned him as to the information I desired but was not successful in getting it. Edgar said that he thought that a 30¢ rate to Detroit was a good one for water shipments. I told him that such a rate was more than the transportation cost and called his attention to the fact that the particular motor ships that he had under his control had quoted rates of about 22¢ the year before. I told him we did not propose to put in a water rate and charge our customers a rate which was higher than we could secure the transportation. He answered me by saying that it was the business of a traffic man to make money for his company. I said I didn't feel that way about it. If we can secure a low water rate we customarily pass it on intact to the buyer. We are interested at all times in reducing our absorption expenses but we are not interested in trying to make a profit on the freight. The subject of delivered prices or refusal to sell [fol. 1352] f.o.b. refinery was not discussed at that meeting. We were not successful in getting from Edgar information we wanted but he did offer to place at our disposal some part of the space on his boats at the 30¢ rate. Of course, we were not interested in that and the meeting broke up.

I have never been asked by a competitor to raise or maintain the freight application unless a question of making a charge for lighterage in effecting deliveries to water lines is considered raising the freight application.

In the summer of 1930 Ripley of American suggested that this practice of delivering sugar to water line piers in New York harbor at a lighterage expense of 6¢ per hun-

dred was performing a transportation service without an appropriate charge and that perhaps it resulted in incorrectly reflecting the true measure of the water rate of the boat line. We did nothing about it. We had always performed this lighterage service. We considered that it was rather desirable for us to distribute our shipping between rail loadings and water loadings and to encourage a certain amount of water shipments. I considered it analogous to [fol. 1353] trucking to a rail terminal. When it came to delivering to a water line, if we could not get around with the lighters fast enough, we would use a truck and occasionally with rail shipments, if not loaded at the refinery fast enough, we might truck them over to a railroad station near the terminal yard so they would go out faster but that was at our option.

I have never asked a competitor to raise or maintain the freight application except during the period when Judge Ballou was trying to make the Code theory of transportation-at-cost effective. I have never been asked, to the best of my recollection, by the Institute or its staff to raise or to maintain a freight application. I have never given any competitor any assurance that if it advanced a freight application or if it put in delivered prices my company would follow. I have not received such assurance from any competitor. The pendency of this lawsuit has not influenced me in announcing any reduction in freight applications.

So far as our company is concerned, the causes of the numerous freight announcements reducing freight applications during the past year and a half have been due to a steadily increasing use of cheaper forms of transportation. I refer particularly to trucking and also to water-line shipments. I presume that the insistence on using those forms [fol. 1354] of transportation has had something to do with the depression—trying to effect economies in costs and so forth—but there has been a very material increase in the use of those facilities, both separately and in conjunction with each other.

National guaranteed against price declines via the C. A. T. Line in 1927. During the first 6 months of 1928 we had no guaranty via the C. A. T. Line or any other route. From June 1928 until July 1930 we had no guaranty from the C. A. T. Line. The real reason for the decrease in our C. A. T. Line tonnage in the years 1928 and 1929 was our general loss of business in the territory which it served.

During 1927 and 1928 a decline in the C. A. T. Line shipments was not as great as the decline in our general business in that territory and during the years 1929 and 1930 the decline was possibly a little bit greater with respect to the C. A. T. Line tonnage than it was with respect to our business. During 1930 and 1931 the decline was again greater with the C. A. T. Line shipments than the decline in our own business. From July 28, 1930, to date we have guaranteed shipments moving via the C. A. T. Line.

[fol. 1355] The all-water lines took the most business from the C. A. T. Line. The lake-and-rail lines were also competitors. The C. A. T. Line is 2¢ lower than the Philadelphia rail-and-lake and 4¢ lower than the New York rail-and-lake. The standard rail-and-lake routes are always considered the fastest service and they compete with the C. A. T. Line. The all-water rates are much lower than those of the C. A. T. Line. Its rate from New York to Chicago and Milwaukee during this period was 47½¢ and the all-water rates have ranged from 34½¢ to possibly somewhat lower. The National Despatch route from New York cost 55½¢, the same as the standard rail-and-lake. During the period we were not giving the guaranty on the C. A. T. Line we were giving guaranty on all-rail, ocean-and-rail, National Despatch and the standard rail-and-lake. During the first 6 months of 1928, we did not give a guaranty on the motor ship or barge and lake shipments at the period we gave the guaranty on some lines.

The Transmarine and Lake was a through, all-water service which handled sugar in individual carload lots. It had a 45½¢ rate. Transmarine has been in the hands of a receiver for several years and their service has been taken [fol. 1356] over by another line which carries the same rates. We did not guarantee over that line. The Great Lakes Transit Corporation is a standard rail-and-lake route.

Dever, to prove that his service was as expeditious as possible, said that the C. A. T. Line was equivalent to transit rail-and-lake. For a number of years he was always coming in to ask me about the tonnage possibilities, and how much sugar was moving over water lines. At other times he indicated he was not getting as much as he did the year before or that month did not compare with the other months of the year previous. In those conversations he brought up

the question of guaranty. He came down once with Adams and told me he understood that the guaranty did not apply on the C. A. T. Line and asked what they could do to change the situation. I explained that his line was slower than some of the others and for that reason we did not guarantee shipments over their route. They asked me whether they should see the Institute about it and I told them it was not a matter that the Institute had jurisdiction over and that the individual companies were perfectly free to guarantee C. A. T. Line shipments if they so elected. I told him if he [fol. 1357] wanted to go up and talk with Judge Ballou, it was his privilege, but in the final analysis he would have to handle the matter with various companies and I told him I would be glad to take it up with our company to see whether we wanted to do anything which would change the situation.

In connection with my duties I have become familiar with transit tariffs. Before the testimony of the witness Bernstein in this case it was my opinion that at no time was it proper to substitute water sugars on rail transit billings. Prior to July 25, 1931, I never heard an opinion contrary to the one which I have just expressed.

Cross-examination.

By Mr. Rice:

The territory in which we distributed and which is also served by the C. A. T. Line includes Wisconsin, part of Minnesota, the northern part of Illinois and part of Iowa. Our sales in that area declined after delivered prices were put into effect. In 1929 we sold 15,000 bags in Iowa, 322,000 in Illinois and 343,000 in Wisconsin, a total of 680,000 bags. In 1928 the sales in those 3 states were 1,030,000, of which 60,000 were in Iowa, 410,000 in Illinois and 560,000 in Wisconsin. In those 3 states our sales declined approxi- [fol. 1358] mately 35% to 40%. The principal reason is the loss of the sales advantage due to the difference between the water rates and the rail rates. The decline was not because of delivered prices. At any time the rail application was reduced to the water basis in order to create a sales advantage, National was apt to lose its shipment because we had no advantage which the California refiner could not offer. If we could show a customer an advantage

of 15¢ a hundred by taking the sugar over the water route, and narrow the difference between our price and the beet price, and if he could get cane sugar during the summer months at approximately what he paid for beet in the winter, he would prefer the cane sugar from the East. When the rail application in this territory was reduced to approximately the water basis and there was no longer an opportunity of having an umbrella held up for the pick-up of the water transportation, it naturally affected our business.

Our sales in the 3 states were not cut down as a direct result of the delivered price system established early in 1929. It was due to the reduction of the rail application to practically a water level.

Mr. Browning: I want to invite your Honor's attention to the fact that delivered prices were not in effect in by far the greater part of this territory at any time.

[fol. 1359] Spreckels became more active in this territory than they had been before by the use of water shipments and cooperation of several brokers. There was a considerable quantity of Hershey sugar that went out, all-water, to Michigan and I have also been more or less under the impression that the beet crop was somewhat larger through part of this period. I also know that C. & H. began to bring a lot of their sugar into New York by the use of water routes. Prior to that time their sugar moved directly into the country. Its presence in the port may have had some effect on our business.

I believe that New York State Barge Canal figures showed just as much sugar moving through the canal during this period as at the time it had most of our business. The Transmarine Company was doing a tremendous amount of business just before delivered prices went into effect. I don't know whether the decrease can be attributed to delivered prices. My opinion is that it is more attributable to the development of motor ships. Edgar transferred his affection to the motor ships as soon as they were available.

When I was soliciting business from large brokers in February, 1929, and agreeing with them that I would pro-
[fol. 1360] vide shipment by barge, I did not make any discrimination between customers. The water rates were more or less predicated on the minimum quantity and it was a natural consequence that the man who could use

that would be in a position to take an f.o.b. shipment by water rate. If he could not use that much sugar, the boat would not take it. I do not consider that any discrimination. National did not have available the one form of transportation that was the most desirable at the early part of the season. If it became a question of moving water sugars out I could have obtained any number of boats but they were not as fast as motor ships which Edgar had.

Redirect examination.

By Mr. McCollester:

Our sales for 1930 for Iowa were 10,000, Illinois 207,000 and Wisconsin 228,000. For 1931 Illinois was 117,700 and Wisconsin 184,000. I haven't the figures for Iowa but I am inclined to believe the amount is negligible. The canal boats which were available in the spring of 1929 did not meet the situation because the sugar had to be transferred to a steamer at Buffalo, bringing the transportation cost up to 28¢. The motor ships in the year previous had been soliciting business at 22¢ and it was rumored that the 22¢ [fol. 1361] rate included rail switching at destination, which made quite a difference. The motor ships travel from New York to Cleveland or Detroit in 5½ days, whereas the combination might take 14 or 15 days. I think the importance of the faster movement is perhaps exaggerated, but we are always under considerable pressure to get sugars as soon as possible so that our customers will not be at a disadvantage.

[fol. 1362] CHARLES H. WHITE recalled.

Direct examination.

By Mr. Peck:

Defendants' Exhibit U-4 was received in evidence.

Petitioner's Exhibits 477 to 479, inclusive, were received in evidence.

For 10 years I have been familiar with American's practice of storing sugar at consignment points. The purpose is to have it at logical distributing centers for quick delivery

to customers. Our practice has been to use public warehouses. The consignment points are selected for terminal facilities and to serve as wide an area and as many customers as possible.

The function of a warehouse is to store sugar and act as intermediate holder between the passage of ownership from refiner to purchaser. The warehouse makes the delivery of the sugar to the customer upon order of the refiner or the refiner's representative, who in most cases is a broker. The warehouse has no authority to make delivery to customers on customers' orders. Both the warehouse and the [fol. 1363] broker report withdrawals direct to the refiner.

The warehouse receipt is taken from the person accepting delivery for the customer. When sugar is put into a warehouse, the refiner keeps the receipt. When the warehouse sends a delivery receipt to the refiner, showing a particular lot covered by the receipt as having been delivered, the receipt is then cancelled by the refiner. There are outstanding non-negotiable warehouse receipts calling for so many barrels of sugar which stand against that warehouse receipt. The individual withdrawals are not noted on the receipt as withdrawals but, after the entire quantity has been withdrawn, the receipt is cancelled and filed away and the same notation is made by the warehouse on every copy of the receipt sent to the refiner.

When the warehouse makes deliveries, it gets a delivery receipt from the customer. The customer's agent signs the receipt for sugar withdrawn from the warehouse which then advises the refiner. We are furnished with an individual copy of the receipt signed by the customer. The broker then sends us a delivery receipt showing that delivery. This advice is important because the credit terms are based on date of delivery. It enables us to determine [fol. 1364] the credit terms. The price on spot sales is made as of the date of delivery and it is necessary that we be advised accurately of the date in order to determine the credit terms of the customer which run from date of delivery and also the price at which sugar should be billed against spot sales. We rely on the delivery receipt furnished us by the warehouse to determine the date of the sale.

Prior to the formation of the Institute, American stored sugar in a very limited way with customers or with ware-

houses affiliated with customers. It stored with about 25 out of 9,600 customers. We determined with which of these customers we would store by the demands that they and their representatives made as to their ability to secure sugar upon consignment from our competitors. It was not our policy to store with customers and we avoided it whenever possible for the reason that in so doing we lost control of the sugar and were unable to check the date of withdrawal. We tried to avoid storing with customers because those with whom we stored did not have to pay storage. Customers had a further advantage of falsely reporting that sugars were withdrawn after a decline instead of the time they were actually withdrawn. The delay gave them additional credit time, an opportunity to collect stor- [fol. 1365] age which was not earned and the *the* benefit of the lower price.

A certain amount is charged for storage the first month and a lesser amount the second. If sugar is actually withdrawn during the first month and not reported until the second, a customer is enabled to collect 2 months' storage. A fraction of a month counts for a full month. Even 1 day over counts for a full month. We paid storage rates based on the established rates of the public warehouses in the markets involved. If there were no public warehouses in that particular market, we paid the average rate at the nearest one.

We did not apply the same consideration to the selection of customers' warehouses as we did to public warehouses. The former were selected on account of demands made by customers and not because of being able to serve a wide area or of the terminal facilities. Generally, only the customers themselves withdrew from customers' consignments. The amount stored with public warehouses was based upon estimated requirements. The amount of sugar stored with a customer was determined by his needs.

It was the general practice for customers, with whom we stored, to establish a warehouse which they largely owned [fol. 1366] or controlled and we stored with the warehouse company in its name. The customer owned the stock outright or through his family and through that control dishonestly manipulated in the way I have described.

Before the Institute we stored in several public warehouses in which customers had control or in which they had

an interest. In some of these cases we hesitated to store with them for the reasons that we did not want to store with a private warehouse or a private customer's private warehouse but we yielded and stored in public warehouses.

So far as the policy of storing is concerned, we distinguished between the public warehouses, in which we understood the customer to have an interest or to be in control, and the customer's wt. house, which the customer used for his own purpose, for the reason that public warehouses which were customer-controlled or in which the customer had an interest were conducted the same as a public warehouse which had no customer affiliation.

The 25 which I spoke about were warehouses which were owned and operated by the customer. Generally, they were in the same building. In the case of the separate ware- [fol. 1367] house companies, we paid the storage to the warehouse company. They had their own bill-heads and letter-heads and we had correspondence with the warehouse company. We stored with the warehouse companies rather than with the customers direct because we were anxious to avoid the appearance of storing with customers and in every case we insisted that the warehouse company be designated as the warehouse rather than as the customer. We were also anxious to avoid demands being made upon us by other customers to store sugar with them.

We had about 200 brokers and between 35 and 40 of that number operated warehouses. It was our policy to store with public warehouses, not with brokers. We felt that in storing with a public warehouse we had better control over the sugar since it was dependent solely upon us for patronage and would certainly carry out our instructions, whereas a broker acting as a warehouseman was dependent upon customers for his business and might be influenced by a customer in delaying the report of withdrawals.

Our brokers supervised the delivery of consigned stocks from a public warehouse. They check[ed] the invoices [fol. 1368] covering the storage to see that we were not overcharg[ed] and supervise[d] the stock which is ordered out, its condition and generally act[ed] as our representative in supervising the warehouse. We depend upon our brokers to recommend warehouses in markets when we open up new consignment points. A broker is supposed to recommend to us warehouses for the best facilities and to secure for us the most favorable rates.

In effecting an arrangement to store with a public warehouse we had a definite understanding directly with the warehouseman that certain rules and regulations must be followed if we were to continue storing our sugar. We advised them that we would expect delivery reports of withdrawals irrespective of whether the broker sent his in or not and irrespective of any instructions received from the broker and if those instructions were not carried out, we would discontinue storing with him regardless of how the broker felt about it and that was definite in every case.

Storage bills are rendered to us direct and do not pass through the broker. They are checked at our office against withdrawals by lot numbers to determine whether or not [fol. 1369] the invoices are correct and paid direct to the warehouse.

Where the broker had a substantial interest or ownership in the warehouse, the element of fear that the broker would give the customer a rake off unknown to us influenced us in deciding in favor of a public warehouse as against a broker's warehouse. In most instances, where we stored with brokers, it was for the reason that a broker had insisted that we store with him and because public warehouses did not have proper facilities. We did not have more than 1 broker in any single community so that it was not a question of rivalry between our brokers in the same community. There was a rivalry as between our competitors and ourselves in getting certain brokers. In storing with brokers, we did not have the disinterested service because a broker who was anxious to have us use his warehouse did not report favorably of a public warehouse. We felt we had a very much better check on our stock by storing with a public warehouse because we had the delivery receipts and withdrawals forwarded to us and also a report of the withdrawals forwarded to us by the broker, which gave us a double check. If we stored with a [fol. 1370] broker, we only had his report and it was a question of the broker checking himself. The broker who stored sugar himself might be influenced by the customer in withholding withdrawals which would give the customer the benefit of any credit terms, additional credit time and a decline in the market, if the report of withdrawal was not made after the sugar had been withdrawn and used. The

delay of a report by a broker-warehouseman would have the effect of giving the broker additional storage which was not earned.

We depend on our brokers to select the best transportation facilities in the movement of our sugar from consignment points to outlying territories, the best trucking rates and the most favorable routes by rail or water.

Prior to the formation of the Institute there were customers to whom we paid brokerage on their own purchases. It was paid under the name of brokerage but really represented a concession, since no service was rendered by the customer to warrant the payment of brokerage. As a general rule we did not permit our brokers to merchandise sugar. They were employed to sell it to as many customers as possible and to devote their entire time and energies to securing new customers and developing busi- [fol. 1371] ness with those already secured. By competing with their customers in the sale of sugar they were defeating the purpose for which they were employed and going beyond the function of a broker. In addition, if they were permitted to merchandise sugar, they held an advantage over the customer in that they secured brokerage which the average customer did not. Edgar & Son of Detroit was a broker engaged in the merchandising of sugar prior to the Institute.

The usual margin of profit for a sugar merchant is 10¢ per hundred in addition to the 2% cash discount. The brokerage ranges from 3¢ in refinery cities to 6¾¢ per 100 pounds in so-called country territory.

Storage averages from 4¢ to 7¢ per 100 pounds for the first month and scales down usually 50% to 33⅓% for the succeeding months.

A warehouse list is compiled and circulated by the Institute. It is a list of warehouses in current use. I have selected and stored in warehouses that were not on the list. I never felt we were restricted to that list in selecting warehouses. We selected warehouses in the same cities as warehouses shown on the Institute list. We preferred, if possible, to store in a warehouse that was not being used [fol. 1372] by our competitors, in order not to have that warehouse compete in arranging service with a warehouse used by our competitors. We were able to secure a little

bit better service from the warehouse. It helped us with our customers.

I have prepared a list of some of these warehouses which we stored with and which were not on the Institute list. They were put on the list after we went into the warehouse and advised the Institute we were using them.

The 31 warehouses were not on the list at the time we began to use them but when we did begin we notified the Institute and they were added to its list. The warehouses in the same city were on the list prior to the time or at the time I first adopted the warehouses in 1931.

Warehouses are recommended by brokers, the recommendations are forwarded to our district sales manager and then referred to me for my final O.K. I never considered that we were restricted to the Institute list. As a matter of fact I rarely ever referred to it.

I am familiar with the list of brokers which is circulated by the Institute. We have selected a broker for our company who did not appear on the list at the time of our [fol. 1373] selection. With the exception of general brokers, we have never selected any broker who was on the list since our company policy is not to use brokers who sell sugar for other refiners. We are not interested in selecting any broker who is on the broker list other than a general broker located in a refinery city. We have not considered that we were restricted to brokers who appeared on the Institute list. I have understood that this list is merely a list of brokers in current use by members of the Institute as well as a list of general brokers used by most refiners.

Cross-examination.

By Mr. Fly:

I know of no case where we continued to store in a warehouse disqualified by the Institute after our competitors had withdrawn. We never insisted on going into the same warehouse in which our competitors were storing.

Referring to Exhibits 391-S-S and 391-Q-Q, the officials of our company to whom I was responsible advised me as the matter of company policy that they had decided they would not continue to use as a broker any firm or indi-

vidual who was engaged in the warehouse business and instructed me to communicate with our various brokers and warehousemen who were acting in a dual capacity and ad-
[fol. 1374] vise them that if they continued to act in the capacity of broker and warehouseman it would be necessary for them to elect being one or the other; that they could not be both and I acted accordingly. I acted because of instructions which I received from the executives of the company to whom I was responsible. I maintained no contact with the Institute and took no instructions from it. Exhibits 391-V-V-V and 391-Q-Q refer to a ruling that the company had adopted as its policy and I received my instructions from my executives and not the Institute. They did not tell me anything about the deliberations that went on at the Institute or whether all of the refiners had adopted the same policy. They told me this would be our policy and I attempted to carry it out. If you have found some other Exhibits which I think are in the files you have noticed the statement is made that this company had adopted this as its policy.

When I stated that sugar in customer-owned or affiliated warehouses was generally drawn out on the account of that customer, I had not checked my records on that, but I was thoroughly familiar with the 25 warehouse arrangements I had in mind.

The difference between a customer-owned public warehouse and a privately-owned customer-owned warehouse is that only the customer withdrew from the latter and the stocks carried there were based on that customer's requirements. There were cases where customers had a large interest in controlled warehouses that were re-
[fol. 1375] garded as public warehouses, with whom we stored, and customers generally withdrew sugar from those warehouses. In those cases, the stock which we carried was based upon the requirements of all the trade in that community rather than the requirements of only 1 customer. We showed a decided preference for the public warehouses over the private warehouses, even though they were customer-owned. After the middle of 1929, we did not store with any warehouse that was to our knowledge affiliated with a buyer of sugar or a sugar broker that is where the operation of the warehouse was conducted by either a buyer of sugar or a broker.

By "operation of the warehouse" I did not mean actual operation as distinguished from stock ownership. I had in mind the situation in Detroit, where the actual building was owned by Edgar & Son but the property leased to a warehouse company, that is, part of the buildings was leased and the other part of the buildings Edgar continued to operate as a public warehouse for the storage of other kinds of merchandise. That is the reason I wanted to differentiate between them.

I do not recall having any trouble with out brokers on account of our competitors' storing with their brokers. I do not recall the matter mentioned in Exhibit 400-B, but I can easily understand that after Savannah had made an [fol. 1376] open announcement to the effect that they would not store sugar with their broker in Rome, Georgia, and then they did, we would certainly have complained. We advised the Institute of our intention to store in a particular warehouse. We did not ask for any information or advice.

It was our practice to wait 6 days after advising the Institute of our intention to use a warehouse and in the absence of the receipt of any complaint from any source we made a shipment to that warehouse. We might have received some information from the Institute, passing along a complaint sent in by a competitor or we might have received a complaint from a competitor direct. We made a practice of withholding shipment to the warehouse pending either the Institute's looking into the situation or investigating ourselves and pointing out whether or not the alleged affiliation or whatever the complaint was, was true. If we made the investigation ourselves we advised the Institute of the results we obtained. Then if there was no further complaint from the Institute or our competitors, we stored in the warehouse.

Petitioner's Exhibit 480 was received in evidence.

[fol. 1377] Redirect examination.

By Mr. Peck:

Referring to Exhibit 400-N-2, it was never our practice to communicate with the Institute prior to rendering information to them of the 6-day notice. In this particular instance, in view of the fact that an affiliation had been found

to exist between the warehouseman and the broker, and on account of our having discontinued storing this matter was brought to Taylor's attention before we filed notice.

We filed our 6-day notice of intention to store and if no complaint was forthcoming we proceeded to store in that warehouse. If a complaint was made to us by a competitor or the Institute about a warehouse we withheld shipping sugar and immediately communicated with our district sales manager in the particular territory where the warehouse was located and requested him to secure more information concerning these complaints. Usually it was a complaint involving an affiliation by the warehouseman either with a broker or a merchandiser. If our representative confirmed that the complaint was well grounded we did not ship to the warehouse but selected another. If he said it was not well grounded, the information was then [fol. 1378] passed on to the Institute and if we heard nothing further which contradicted our representative's information, we shipped sugar to the warehouse. If we heard something more then we did not ship until the matter could be cleared up. Generally, the Institute had 1 of its investigators look into the situation and render a report. If it indicated that the complaint was justified, we were advised and did not ship to the warehouse. If it was not justified we began to ship immediately.

[fol. 1379] CHARLES B. CASTLE was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I have been connected with the National Sugar Refining Company of New Jersey since 1917. I am in charge of sales outside the metropolitan area, which includes New Jersey and the New England territory, and have occupied the position for the last 3 years. From 1924 to the middle of 1928 I was in the consignment department, which was part of the sales department. The consignment department's function was to carry on the shipping of sugars to various consignment points which we maintained and to keep the records of stock on hand at all times. I am fa-

miliar with the warehousing of our company's sugar before and since the Institute.

About 27½% of our company's sugar is sold ex-consignment. In selecting public warehouses, we usually consider the character of the building, its facilities for rearching outlying territory, the railroad which might be reached from that warehouse and the number of customers near it. We depend upon our brokers to recommend warehouses which we use. I pass on their recommendations. The amount of stock we keep in a warehouse depends on our [fol. 1380] estimate of the requirements of the territory. The storage charges in public warehouses vary between 5¢ and 7¢ for the first month. I cannot recall any change in those figures in the past 7 or 8 years.

National began storing with customers prior to 1924. At that time we did not have many customers with whom we stored. The number increased and reached its peak in 1927 when we were storing with about 100. We have around 2,025 regular customers. It was not our policy to store with customers because it led to duplication of stock, increased the amount of stock we had out and destroyed the liquid state of our consigned stock. We could not shift it around. If we ran short of stock at one locality we could not reconsign stock which was in a customer's warehouse into the locality in which it was needed because it was put there for the exclusive use of that particular customer and other customers did not generally draw upon it. Furthermore, there was no accurate check on withdrawals. The public warehouse notified us when each withdrawal was made and sent a copy of the delivery ticket. We received nothing from the customers except a delivery from consignment report from the broker. We were unable to check [fol. 1381] customers' withdrawal to learn whether or not they were being properly reported.

The function of the warehouseman, as far as the refiner is concerned, it to keep the stock in good condition, to store it until he is requested to deliver it, in some cases to load it into freight cars for reshipment to points beyond and to report each delivery made from that stock. The report is important as it enables us to check the record of withdrawals and send out invoices from it. The date of the report of of withdrawals determines the customer's credit terms. The invoice is dated as of the day of withdrawal

and the credit terms time starts from that date. If the withdrawal is against a contract, the price of sugar is not affected by the report of the date of withdrawal. On spot deliveries the price is determined by the date of the reported withdrawal.

In the majority of cases we stored directly with the customer rather than the warehouse which he controlled. Location and character of storage facilities, which generally governed our selection of warehouses, did not apply to customers with whom we stored. In most cases we paid these customers the regular storage rate. Sometimes we did not pay storage. In other instances we paid as high as 10¢, [fol. 1382] which was higher than any public rate. The amount of sugar which we shipped customers depended on their requirements and line of credit. Except in a few instances, we paid the customer a flat storage rate instead of a stated amount per month.

We determined whether we would store with customers on their representations that the same terms and conditions were offered by a competitor. The amount of storage we were to pay was also determined by competition, that is, by the representation of the buyer of what could be secured from our competitors.

I have arranged for the storage of our company's sugar in a warehouse which is not on the list circulated by the Institute. I did not consider that I was restricted in the use of warehouses to those on the list. We considered it a list of warehouses which were being used by members.

We considered the Institute broker list a list of brokers that were being used by members and did not feel that we were restricted in the use of brokers to those whose names appeared on it. At times we employed brokers who were not on the Institute list.

[fol. 1383] Cross-examination.

By Mr. Rice:

When we chose a new warehouse that was not on the list kept by the Institute, we filed the notice of intention to use that warehouse with the Institute. The notice meant that we felt that that warehouse was a non-affiliated public warehouse and we usually waited 6 days for complaints. If none came from the Institute after 6 days, we stored sugar in the warehouse. After the lapse of 6 days we received a no-

tice from the Institute that no complaint had been received. I presume that the Institute put that warehouse on the warehouse list.

I do not know of any case since the warehouse list has been compiled where National stored sugar with any warehouse that was not on the warehouse list or that was not subsequently put on that list. If the warehouse were found to be affiliated, we withdrew from it in every case, unless our own investigation found the facts to be contrary. I cannot think of any case in which our own investigator found the facts contrary to those found by the Institute.

We chose customers' warehouses prior to 1928 upon the basis of competitive demands, that is, upon the representation of the customers that those terms could be secured [fol. 1384] from a competitor. All members stopped the practice after May 2, 1929.

Prior to the formation of the Institute I had no check on the withdrawal of sugar from the customers' warehouses. The brokers sent us a delivery report, presumably on the basis that sugar was already withdrawn. I do not know how he secured the information. Through the delivery from consignment report of the broker we had a check on the customer.

Redirect examination.

By Mr. Peck:

The broker was not located on the buyer's premises. In some cases he was 50 to 75 miles away. I don't think that the broker was present every time a customer took out a bag of sugar. I understand that the buyer notified the broker that he had withdrawn so much sugar and afterwards the broker sent us a delivery-from-consignment notice.

We did not determine whether or not we were going to store in the warehouse by whether or not it was on the Institute list. We did not determine whether or not we would use a broker by whether or not he was on the Institute list.

Petitoner's Exhibits 481 and 482 were received in evidence.

Defendants' Exhibit S-5 was received in evidence.

The Court: Exhibit S-5 is admitted only for the purpose of showing the good faith of Raymond in his interpretation of the tariffs.

[fol. 1385] Evan T. Fisher recalled.

Direct examination

By Mr. Peck:

I am familiar with the compilation and circulation of the Institute warehouse and broker lists. The warehouse list is a list of the warehouses in current use by members and non-members of the Institute. The broker list is a list of brokers in current use by the members of the Institute. My purpose in circulating and maintaining this list was to give the members the names of warehouses throughout the country that other members believed to be bona fide public warehouses so that, in expanding their territory, if a member desired to place consignments in some down or city where he had not previously carried them, he would have some indication as to what other members believed to be public warehouses.

The second reason was that when a member received a complaint against a warehouse he had no way of telling whether or not it was in active use and whether it was worth while to send the complaint to us unless he had some list of the warehouses and members using them. We had numerous complaints about warehouses and had no idea [fol. 1386] to whom to send them. The only thing we could do was to broadcast them to all the members and hope that we reached somebody who was actually using the warehouse.

The third reason was that it provided the Institute with a list of the warehouses which the members were using so that we could send any complaint about a warehouse to the refiners whom the list showed were using them.

The list of warehouses is not approved by the Institute. It does not have a list of approved warehouses. It has no list of warehouses except the list about which I am testifying. To my understanding this warehouse list is not a list to which the members are restricted in any way in the storage of sugar. The information which we put on

the warehouse and broker lists comes in currently to us from the members. They do not tell us what ones they are using but every time they had a new one or eliminated an old one we were notified of the fact. The warehouse list was issued on October 24, 1928.

On July 31, 1928, we addressed a letter to all members of the Institute asking them to send a current list of all their warehouses and brokers and also to notify us as they added or removed other warehouses or brokers from that [fol. 1387] list. We then compiled a list of all warehouses and brokers of which we were advised by members. The first list was somewhat different from the current one because at that time we did not put down the names of those using the warehouses. Now the states are listed alphabetically, as are the cities in the states. Then the warehouses and those using them appear.

The members began sending changes to the list and on November 14, 1928, we issued our first supplement. It was merely a compilation of additions and deductions that had come in in the meantime. We continued to issue supplements and occasionally revised it until August, 1929, at which time we adopted the present loose-leaf book. We adopted the loose-leaf book because the supplements were necessary too frequently. By subdividing it into states we had only to revise it at stated times instead of covering the whole country.

On September 12, 1929, we requested the members to give us 48 hours to check up on a warehouse before they went into it. That time proved to be too short and on December 7, 1929, we increased the time to 72 hours. That again proved to be too short a time so on November 20, 1930, we increased it to 6 days.

[fol. 1388] Defendants' Exhibits T-5 to V-5, inclusive, were received in evidence.

The warehouse and broker lists are arranged as they are current today, not at the time the Government's suit was filed. We are notified by refiners when they add a broker and we are notified 6 days before they add a warehouse. When they discontinue the use of a broker or warehouse they advise us and we take them off the list. They do not advise us why they are discontinuing.

In the back of the Illinois section of the warehouse list there is a list of Chicago warehouses. It contains many

warehouses which none of our members use. In April 1928 the brokers in Chicago compiled a list of warehouses which they believed to be strictly public warehouses. That list was circulated by the Institute in November, 1929, before we got out the warehouse book. In September, 1930, we had requests for additional copies so we decided to put it in a warehouse book where it could be found readily. The Institute had nothing to do with making up that list. It was done by Chicago brokers. With the exception of that Chicago list all of the warehouses on the warehouse [fol. 1389] list are warehouses in current use unless somebody has dropped one and failed to notify us, which very often happens.

When we receive a notice from a member that he expects to use some warehouse we circulate it to all the members who carry their stocks in that state, if the warehouse is not already on the list. If we receive any complaints before the 6 days expire, we notify the member who sent in the name of that warehouse. During that period the warehouse is not added to the list. If we do not receive any complaints inside of the 6-day period, we so notify by wire the member who has submitted the name and add the name to the list. If it is at a new consignment point we do not add it until we have received information from the member that he has actually shipped sugar to the warehouse. If a member notifies us that he is going to use a warehouse already on the list, we merely wire back immediately that we have no complaint against that warehouse. He does not wait 6 days but goes in right away.

As soon as we are advised that a member is using a new broker we add the name to the list. The absence from the list of the name of any broker or warehouse means that they are not used by any member of the Institute. It does [fol. 1390] not mean they cannot be. New names are being added and old ones are being taken off constantly. We have issued 2,000 or 3,000 supplements to the warehouse book. There are not quite as many to the brokers' book because members do not change brokers as frequently as they do a warehouse.

If a warehouseman makes an application to us to be put on the warehouse list we do not put him on. We tell him if he wants to store sugar to take it up with the members. Exhibit W-5 is typical of letters that come in to the Insti-

tute from warehouses asking to store sugar and to be placed on the mythical "approved list".

Defendants' Exhibit W-5 was received in evidence.

It is not a condition precedent to being put on the warehouse list that the warehouses sign a non-rebating agreement. We know whether the refiners sign non-rebating agreements because our files are full of copies. There are a few warehouses on the list which have not signed the non-rebating agreement. These are mostly railroad warehouses whose rates and practices come under the jurisdiction of the I. C. C.

[fol. 1391] We do not have non-rebating agreements from railroad warehouses and certain others because the list may be printed at the end of 6 days and we may not get the agreement until 14 days. If we do not get the agreement after 14 days, we write to the member to find out why we haven't. I do not recall a case in which the agreement was not eventually sent. I do not check to see whether a non-rebating agreement has been received before I put the warehouse on the list. At the end of the 14th day, if the non-rebating agreement has not come in, the name continues on the list undisturbed. We write the refiner asking him why he has not gotten it and in every case we have gotten it within 2 months.

The same practice governs the broker list. In most instances the first intimation we have that a member has taken on a new broker is when we receive a broker's pledge. We started receiving brokers' pledges in the spring of 1930. We started the broker list in 1929. The warehouse list was started before the warehouse non-rebating agreement.

Where a refiner has given a 6-day notice of intention to store in a warehouse we circulate the name among the refiners doing business in that state. We send any complaint [fol. 1392] to the member who has given us the 6-day notice. He either writes and tells us that he thinks the complaint is correct and is not shipping to the warehouse, or says he has discovered facts indicating that the complaint is not correct and recites them. When we receive the letter, we send it to the complainant who either says he is satisfied with the explanation and will withdraw the complaint or that he is not satisfied and would like to have

the warehouse or broker investigated. In the latter case we have our nearest investigator conduct an investigation. We do not conduct an investigation of 50% of the complaints received. The Enforcement Committee had nothing to do with this. The 6-day notice came in after the Enforcement Committee went out.

When we send an investigator out he goes to the warehouse, presents his letter of authority and requests any documents or other evidence that will show whether the warehouse is affiliated with the buyer or broker. He then sends us a report. The custom has been changed but at the present time that report goes directly to the Executive Committee and they consider the evidence the investigator has found and decide whether or not the complaint is justi- [fol. 1393] fied. A copy of the finding is sent both to the complainant and the member complained against. Generally that settles the matter.

If a member is not satisfied with the finding of the Executive Committee, he appeals to the Board of Directors for a review of the case. We will reconsider a case if someone so desires. Frequently we have changed our findings. A member using the facilities complained of always goes back to the warehouse and gets its or the broker's side of the story and protests vigorously if he is convinced that the complaint is not correct. The warehouseman does not personally appear but the member who is using the warehouse does and raises Cain about it if he is convinced the complaint is wrong.

There was a resolution of the board on November 26, 1930, which gave authority to the executive vice-secretary to make a finding where the complaint was one of warehouse affiliation. For a short period after that resolution was passed he exercised the authority given. I do not believe there were over half a dozen cases in which he made any finding. Anybody who disagreed appealed to the Executive Committee and, if they still disagreed, to the Board. [fol. 1394] There were no cases where the charge of the complaint was that the warehouse was doing anything to defeat the refiners' freight application. There could not be any cases considered by the Institute where the objection of the complainant was that the warehouse was lowering or varying the price at which sugar was sold by the refiners because the warehouse did not have anything to do with the price of sugar. There have been no cases where

the complaint was that the member was failing to cooperate with the Institute in this program of enforcement.

We have no cases where we have considered any action of the wholesale grocers in failing to cooperate with the Institute. We have never considered a case of a wholesale grocer or jobber and have nothing to do with them whatsoever. The Institute has never asked a broker, warehouseman or jobber to trace down or report any alleged violations by brokers or warehouse agreements.

Both of our investigators have so-called "letters of authority," which are letters signed by all the members of the Institute. At the present time all members but Colonial have signed a letter authorizing the warehouse or broker [fol. 1395] to allow the investigator to see any files or correspondence relating to the handling of their sugar. Exhibit X-5 is a photostatic copy of the letter that we gave them.

Defendants' Exhibit X-5 was received in evidence.

If a broker or a warehouse does not comply with that request the investigator promptly notifies us and we take it up with the refiner and ask him to see if he can prevail upon the warehouse or the broker to make those records available. If the refiner does not succeed the investigation stops.

Exhibit Y-5 is a record of every case which the Institute considered. There are other records. There are no more cases. This record contains only the cases in which an investigation has been made. I made it from the investigators' reports and the action of the Committee. In each case there is a brief summary of the material which was presented.

Defendants' Exhibit Y-5 was received in evidence.

The court: Exhibit Y-5 is admissible as showing merely that these are the cases that have been looked into and not that the reports therein are correct.

[fol. 1396] In October, 1929, the Institute published a list of warehouses in southern territory. There was only 1 list and it contained warehouses which members believed were not affiliated with any broker or buyer of sugar. It was sent to all members. It was not a part of the regular warehouse list. Savannah had disregarded the Code of

Ethics in that southern territory. When they tried to straighten things out again this list was sent in. In the meantime, during the breakdown, all the members in that territory had begun storing sugar with customers' warehouses and when they tried to return to an ethical basis again, the Institute requested all the members to send in a list of warehouses which they believed were not affiliated with anybody and we circulated that list for the information of the members in that area. They did not say, when they sent in that report, that they were not using others.

"Reconsignment warehouses" is another misnomer. I invented the term and later discovered it was not correct. What was meant was storage-in-transit warehouses. The supplements are being changed to carry that heading as they are reissued. Storage in transit points are determined by the railroads. The Institute has a separate list of storage [fol. 1397] in transit warehouses. It appears in the warehouse book. There are a great many warehouses, from which the railroads permit storage in transit shipments, that are not listed on the buff sheets in the warehouse book because the refiners also carry stocks in those warehouses for local delivery. The warehouse names appearing on the buff sheets as storage-in-transit warehouses are warehouses where the members carry stock only for storage-in-transit. It is a part of the warehouse list. These are warehouses in current use, the same as other warehouses. If a storage-in-transit warehouse was being used for local deliveries, it would not appear on the regular list and the storage in transit lists are those used exclusively for storage in transit purposes.

Recross-examination.

By Mr. Rice:

After a finding by the Executive Committee or Board of Directors that a warehouse was disqualified, the member interested sometimes did nothing. He just continued to use the warehouse or the broker. In other cases he reported that he disagreed with the finding of the Committee, from evidence in his possession or from what he believed could be obtained, and requested another investigation or merely [fol. 1398] presented the evidence to the Committee and they changed their finding.

Petitioner's Exhibit 483 was received in evidence.

Redirect examination.

Mr. Mr. Peck:

I was not always called in when the warehouse matters were discussed. That is a small part of the Executive Committee's activities.

Up to January of this year the Institute members reported they had used 1,483 warehouses. Less than 6% of those warehouse names appear in the Enforcement or Executive Committee minutes. When a report from an investigator was received by the Institute, my job was to read the report and prepare a summary of it which was sent to the Executive Committee or the Enforcement Committee.

The summaries were read at the Committee meeting and the action taken was almost always based upon them. When I was present, as I frequently was, I heard the discussions that took place. If I was not present I went into conference with Taylor and Judge Ballou as soon as the meeting [fols. 1399-1400] was over and discussed what action had been taken and was advised as to what I was to do in clearing the matter back to the members.

[fols. 1401 & 1402] FRANK E. SULLIVAN was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Higgins:

I have been in the sugar business since 1896. My experience has been one of the practical side of the business almost entirely. In 1917 I became general manager of the Western Sugar Refinery, a cane sugar company. I have continued in charge until the present. In the spring of 1928 my direct superior retired and I was elected in his place.

The Western Sugar Refinery is a department of the J. D. & A. B. Spreckels Investment Company and is not a separate company. The Investment Company owns the majority and minority interests in plantations producing raw sugar in Hawaii and the Philippines. About 50% of the sugar

refined by Western is obtained from these affiliates of the Investment Company in Hawaii and the Philippines. The balance, except 10,000 tons, comes from certain plantations in the Hawaiian Islands, known as "independent" plantations, which send all of their output to us. The 10,000 tons, which we call "full duty sugars", are bought in the world market. On the Pacific Coast there is a large canning in- [fol. 1403] dustry which is engaged in a great deal of export trade and for the portion of their packing which is exported they get the drawback on this grade of sugar which they would not on a duty-free sugar. It is regarded as a business advantage to them and for that reason we buy that sugar.

I was the only representative of our company present at the meetings prior to the formal organization of the Institute. I favored its organization. Our company did not join immediately because about that time there were some negotiations pending for the purchase of the Spreckels interests, including Western. Western never joined the Domestic Sugar Bureau. We finally joined the Institute in October, 1928, after the negotiations for the sale of the Spreckels' interests failed. After our company joined I did not attend very often because of the great distance. I only attended one meeting in the fall of 1928 and the annual meeting in the spring of 1929. During the spring of 1930 I was present more frequently.

Western has never given rebates or concessions in the sale of its refined sugar. Its policy was always to sell on openly announced prices and terms. Our public announcements consist of sending notice to our brokers [fol. 1404] and posting the same notice on the bulletin board in our refinery office and notifying the press, the News Bureau, etc.

We did not give rebates in the form of a price reduction or concessions in the form of advertising allowances, storage allowances, alleged export contracts, options, or any concessions of that sort to any of our customers. We did not sell at the same time and in the same market to one customer or a group of customers at different prices from our prices to other customers in that market, but I would like to qualify that a little bit. We had 2 contracts, one for canners on the Pacific Coast and one for our regular trade. The canners' contract is for a longer period of time but at the same price at whatever the booking is made and

anybody else can book at the same price. The length of time the contract runs depends upon the time that the canners exercise their option of booking.

According to information I had at the time I attended the organization meeting, before the Institute was formally organized, C. & H., Revere and Arbuckle were following the same sales practice and publicly announcing prices as we were. We heard all sorts of rumors as to the practices [fol. 1405] of our competitors in this particular. We did not have actual facts but I was convinced that they were not selling on openly announced terms. At the organization meetings prior to the formal incorporation of the Institute there were more or less free confessions as to what their practices had been.

Our company joined the Institute because we were willing to join any organization which provided a working arrangement like the Code of Ethics, which appealed to us. We could not indefinitely accept conditions as they were. We were losing customers but could never find out exactly why we lost them. I believed that customers were receiving secret and attractive terms and rebates which we did not give them. Our customers asked for rebates and represented that they had been offered such rebates by others. They asked us what we could do for them and when we said we could not do anything, except what we had openly announced, they said we would have to do better than that because they could get sugar on a more attractive basis. Sometimes they would mention terms and sometimes they would mention figures, but we never knew whether they were telling the truth or not. Our brokers, who most frequently [fol. 1406] told us of this condition, brought pressure to bear to meet this type of competition. They were anxious of course to have us meet these vague terms. We did not know exactly what they were but we do know that we lost business. There was a fatal coincidence between these representations and demands for concessions and the loss of a customer.

In addition, we had long felt the need of some manner of exchange of statistical information for which the Code of Ethics provided. From the time the Institute was organized and before we joined it, we cooperated in the matter of sending our statistics as to melt, deliveries, stocks on hand, etc. In turn we received from time to time the statistics which were collected and disseminated. The matter of

industrial advertising came afterwards as did also the matter of the fellowship of the Mellon Institute for Research which was very attractive and very interesting.

Sugar prices were never discussed at any of the meetings of the Institute which I attended. There was no price propaganda, margin propaganda, or anything of that sort at any of the Institute meetings I attended.

I was never asked by any officer or employee of the Institute to maintain or advance our sugar price. None [fol. 1407] of our competitors ever asked me to advance or decline our sugar prices. None of our competitors ever assured us they would maintain or advance their price. None of our competitors ever asked us not to decline our price. I never gave any of our competitors any promise, assurance or intimation that I would maintain or advance our prices or not decline them. I never asked any of our competitors and none of them ever asked me to follow or not to follow a price change announcement.

A "delivered price" is the price charged the customer on the prepaid basis even though at the time he has the privilege of buying f.o.b. refinery.

Our freight applications to the territory east of the 11 western states, in which we sell in competition with the eastern and southern refiners are less than the actual freight cost to get our sugar from our refinery to these places. In the 11 western states the customers pay all the freight. The eastern and southern refiners have never been in our territory except in a few isolated cases. I have never heard the subject of delivered prices, in the sense of prices made up of basis price at the refinery and a freight application to the point of delivery, under conditions where the [fol. 1408] customer was not given the privilege of buying f.o.b. refinery, discussed at any meeting of the Institute which I have attended.

I heard the zoning plan briefly discussed at one of the meetings of the Institute in the fall of 1929. The thought was expressed that certain commodities should be on the basis of certain freight rates for certain zones. I considered at the time it was one of those Utopian things that could not work in a practical way. Aside from that meeting I never heard it discussed.

I remember when delivered prices were announced in 1929 for the canal and lake ports by some of the refining companies. When the Federal Barge rates went into ef-

fect from New Orleans, based on 80% of the rail rate, certain refiners began to use those rates for barge shipments only. We didn't worry a great deal because we considered the element of time would protect us. Later we learned that some refiners were shipping rail and using the barge application which immediately produced a serious situation for us. After that, we had to prepare to place stocks in New Orleans so we could take advantage of the barge rate. In April, 1929, all of the rates in the southern area and a great portion of the 11 states broke down to the barge applica- [fol. 1409] tion. That did not end it. The rates further broke down to the lake application at Lake ports, such as Chicago. The condition has continued ever since with the exception of a very short interval and is in effect today.

Western followed the announcement breaking down rates at Chicago and Milwaukee as did the other refiners. I remember the incident of the Arbuckle announcement which followed. According to my recollection that was a matter of making a 35¢ prepay to Chicago and the lake ports. We were interested principally in Chicago, Milwaukee, Duluth and Green Bay. At that time we had not been selling east of those points. Western followed American's announcement reestablishing rail-and-lake rates at canal and lake ports and establishing delivered prices. I did not have any prior information that such an announcement was thought of or was coming out. I did not have any discussion with any members of the Institute or with any of our competitors about the possibility of making such an announcement. The first information we had came through our brokers. We got most of this information through our brokers. The information was not that it was going to be done but that it had been done. We did not give any assurance to any [fol. 1410] of our competitors or to any representatives of the Intstitute that if those prices were announced we would follow. We followed the announcement because it was advantageous for us and lessened our absorptions. At that time, we did not have the advantage of any differential route into the Chicago, Milwaukee and Duluth markets.

We were not selling in the Warrior River area. Commencing some time in December, 1929, and running up to May, 1930, there was a system of delivered prices in effect in that area. We never used the Warrior barge service and were never interested in delivered prices there. I did

not have any prior information or information of any sort that delivered prices were considered or about to be announced by any refiners in either the Mississippi or Warrior River area in 1929.

I have never been asked by any of my competitors nor have any of my competitors asked me to follow any freight application that they made or announced. None of them ever asked me to maintain a freight application. I have never agreed with or promised my competitors that I would maintain a freight application. The question of freight application was never, to my knowledge, discussed at any [fol. 1411] of the Institute meetings which I attended.

I heard Judge Ballou talk about the principle of not selling transportation at less than cost. I never heard it in any official Institute meetings. I was not in favor of the principle because we have to absorb on everything east of the 11 western states and it would become a very serious problem with us right from the start. Furthermore, we did not think it was practical; we thought it was another one of those things that would not work out.

Before the Institute we sold sugar as far east as the Mississippi River, from a line extending from the northern boundary of Arkansas, taking in Oklahoma and north central Texas and everything up to the Great Lakes, including all but the northern portion of Wisconsin. At times we did a little business in western Indiana but that was merely because the house to whom we sold, Hullman & Company, was located in Mattoon, Illinois. Before the Institute, we were not selling in any other part of Illinois or any other part of Indiana except the western fringe. We were not selling in Kentucky, Tennessee or Ohio. We confined our sales to the territories described because that was the maximum distance east we could reach with the freight [fol. 1412] rate we had. As we went further east freight rates worked against us. Before the Institute we were not shipping at all by water through the canal or up the Mississippi River.

Defendants' Exhibit A-6 was received in evidence.

In Exhibit 411-C I stated that "we got into a jam in the matter of some tolled sugars." We had 2 cargoes of raw sugar which had sailed from the Philippines about April 3, 1930, which had been diverted to the Atlantic Coast.

There were 5,200 long tons on the Baron Dalma and 8,100 long tons on the Musunda. As these 2 cargoes approached the coast there was quite a softening of the raw sugar market. I tried to sell them but found there was no demand. It is a pretty serious matter to have a cargo of sugar arrive at a port unless you can dispose of it because of the cost of demurrage and other expense.

I arranged with Spreckles to toll the sugar in the Baron Dalma and put it in his bags and have it sold by Lowry in the Atlantic Coast markets under Spreckles' brand.

[fol. 1413] Similarly I arranged with Hoodless of Pennsylvania to toll the Musunda cargo and sell it in Chicago under Pennsylvania's brand. Subsequently, however, when the sugar was ready to ship he bought 26,000 bags from us in Philadelphia.

Lowry acted as our broker in disposing of the sugars we shipped to Chicago which had been tolled by Pennsylvania. About the time the Musunda cargo began to move into Chicago we were told by the Institute that the Baron Dalma sugar was not being sold under publicly announced prices and terms. The Institute wanted access to Lowry's books. I asked Lowry what the trouble was and he asked permission to show our records, which I granted. That resulted in a great deal of discussion but an audit of the situation did not disclose any improper action by Lowry.

After they had this question about the Spreckles' tolled sugar they also followed up the Pennsylvania tolled sugar in Chicago. They found that 100 bags of that sugar had been sold at the list price but billed on a post-dated price and the price went down 5¢ and all that the records showed so far as the audit was concerned was that the 100 bags were sold at 5¢ under the quoted market. We insisted on [fol. 1414] Lowry's paying this 5¢ and they made it good to us. I arranged for all the billing to be done by Lowry. I practically put him in the position of a dealer for the reason that I did not want to confuse those cargoes with our Sea Island brand. Neither of the cargoes was packed in bags with our name on them. One had Spreckels' name and the other Pennsylvania's.

In the course of these dealings there was never any discussion between me and any representative of the Institute or any other refiner wherein any subject was raised about our right to toll these sugars or our practice of toll-

ing them or any charge of any violation of the Institute's Code by having them tolled. I have never heard from any source whatever that any member of the Institute or any representative of the Institute or any one in the sugar trade had opposed or criticized my company for the tolling of these sugars. When I used the sentence "We got into a jam in the matter of some tolled sugars," I referred to those telephone calls and complaints we had from the Institute that they had information or were advised that these sugars were not being marketed under publicly announced prices and terms. Neither I nor my company were [fol. 1415] charged with knowingly participating with Lowry in the sale of these sugars at other than openly announced prices or with any other unethical practice in that connection.

Referring to the testimony of O'Riley concerning the sales of sugars in Chicago which he described as allegedly hard and lumpy and in the course of which he charged that our company knowingly participated with Lowry in an evasion or violation of our openly announced prices through the sale of these sugars to the Thin Shell Candy Company, the facts of the situation are: In July we had shipped to Chicago about 141,000 bags of this sugar, which was packed in Pennsylvania bags, and stored it in the North Terminal Warehouse. We intended to sell it at our announced prices and terms. We found that certain dealers and buyers had the sugar spotted and word was passed around to let that sugar stay there, that eventually they would get it at a lower price and from that time on until the end of the year we succeeded in selling about 17,000 bags at the full price.

After we found it could not be sold in the regular course of the business and declared it a frozen stock, we instructed Lowry that we would only sell it to manufacturers, so that [fol. 1416] the sugar would never come back to plague us again in our trade. I did not have any discussion or conversation with any representative of the Institute or with any other refiner concerning the issuance of those instructions. We made 1 sale of 20,000 bags to the Chicago Powdered Mills which resulted in a great deal of confusion in the trade and a great deal of disadvantage to our Sea Island brand. It did come back to the general trade so I withdrew the whole thing from the market and told Lowry

to forget it. Meanwhile, in the sale of our Sea Island brand we persuaded buyers to take bulk deliveries of this sugar instead of our regular Sea Island brand. We kept that up from the first of February until about the end of May but were able to dispose of only a few thousand bags. The storage was eating it up so I again told Lowry to sell it as frozen stock but not to sell to anybody except a manufacturer, canner or candy maker who would promise that he would use it in his own trade and not offer it for resale. I immediately began to get a number of orders. Offers came in to Lowry from 2 or 3 different sources who were willing to take the sugar on our terms. The Thin Shell Candy Company finally agreed to take it at the beet price and not to resell it in the general trade. In a few days it be- [fol. 1417] came known all over Chicago. I had conversations with Hogan, the head broker of Lowry. The deals were handled primarily by Murphy, head of Lowry's office in Chicago.

I define a frozen stock as one which cannot be readily sold to the trade and it becomes more frozen when the principal realizes that he cannot continue to do business in that market with that particular brand. I advised the Institute that it was a frozen stock, that we were going to sell it and that I would notify them what we received for it as soon as we received the price, and I did so. There was no objection by any representative of the Institute or any other refiner to our selling this as frozen stock.

I am familiar with Exhibit 435, a wire from W. T. Eldridge of Imperial to me. I did not answer that wire. We had just a few days before placed a consignment stock at Corsicana and did not withdraw it. We did not replace the sugar we had stored there after it was sold because it took 4 months to sell it. We stayed out about 3 months and went back in again and have been there ever since.

I do not know of any pressure, coercion or inducement by the Institute or any of its members upon the beet manufacturers, who organized the Domestic Sugar Bureau, to [fol. 1418] form their own organization. The Domestic Sugar Bureau had its inception before the Institute. I did not hear of any attempts on the part of any cane sugar refiner to induce or persuade the beet sugar refiners to organize a bureau or institute.

Cross-examination.

By Mr. Fly:

I never heard any discussion of freight application in the Institute. I was present at the Executive Committee meeting of May 22, 1928, as a guest for only a short time and was not a member of the Institute at that time.

The Directors' meeting of November 15, 1928, was the first meeting which I attended as a member of the Institute. Page 151 of the minutes merely reports a discussion of whether, on the closing of water transportation, we would go back to the lake-and-rail rate. It was not a question of discussing the change in the application rates. Every year the probable absorptions there have been a question with the refiner. When the lake routes are open they have the barge rates to contend with. When they close, the refiners go back to the all-rail rate. This was not the general subject of the meeting. The particular subject, the only thing that impressed me, was the subject of zoning.

The sugar tolled by Pennsylvania and shipped to Chicago was all good merchantable sugar which we were anx- [fol. 1419] ious to sell at the full market price but could not and we eventually had to sell it as a frozen stock. The sugars, concerning which I said I was in a jam, were not this lot of sugar at all, but the lot of sugar which was refined by Spreckels and had nothing to do with the sugar that went to Chicago.

The jam referred to in Exhibit 411-C consisted of this: As far as we know, that sugar which was sold was very high grade and we got the full market price for every pound of it according to the publicly announced prices and terms and the jam consisted of a feeling on the part of the Institute that the sugar had not been merchandised on openly announced prices and terms. That sugar was marketed largely around the New York metropolitan district and throughout the state. One lot went to the Heinz Pickle Company and another to a concern in Elmira. Lowry sold it for us. That was the subject matter of these minutes of the Executive Committee.

Some of the frozen stock in Chicago was sold at concessions as high as 35¢. I never heard that the Institute interested itself in the sale of the frozen stock in Chicago. I never discussed the matter with the Institute. I did not

hear from other refiners but only from our brokers who were very much put out because they said we put out a cheaper priced sugar there to compete with our Sea Island [fol. 1420] brand.

Redirect examination.

By Mr. Higgins:

I did not authorize and I do not know of any sale of any of this stock of tolled sugar in Chicago at less than our openly announced price, prior to the time I began to sell it as frozen stock in January 1931, after it had been in Chicago about 6 months. I advised the Institute that we were going to sell this sugar as frozen stock and would have to sell it at a concession. Lowry advised the Institute from time to time of the sales of frozen stock he actually made.

[fol. 1421] FRED G. TAYLOR Recalled.

Redirect examination.

By Mr. Peck:

There was a great deal of discussion at the Institute among the refiners in reference to the situations which were intended to be covered by Code clause 3(d) and Paragraphs 2(d) and 2(e) of Section V of the Code Interpretations. The situation with respect to the payment of brokerage to customers or brokers who were merchandising sugar became aggravated late in 1928. Commencing October, 1928, problems or complaints were brought to the Institute by refiners regarding these alleged affiliations of brokers and warehouses with buyers. The discussions continued until May 2, 1929, the time of the adoption of the resolution bearing on that question. They were discussed at both Executive Committee meetings and Directors' meetings. Practically everyone present took part in the discussion at one time or another, particularly the refiners of the Northeast.

The questions were more acute in the North than in the South at that time. It was pointed out by Place that the very discriminations which the Institute had sought to re-

move from the industry by the adoption of the Code of Ethics were being defeated by brokers who were continuing [fol. 1422] to merchandise and pay part of their brokerage to customers. In addition, the brokers themselves were engaged in some instances in merchandising, thereby making themselves preferred customers. They were to all intents and purposes receiving a rebate or a concession on the amount of sugar they purchased and sold for their own accounts. Other members of the Institute referred to the same subject. Abbott pointed out that the Code provision for a refiner to keep control of his own sugar was being defeated by this practice. Worcester said that the broker who merchandised his own sugar defeated the purpose of the refiner for if the market situation justified the refiner requiring his broker to make immediate liquidation of stocks at a consignment point, it was reasonable to suppose that the broker would devote himself to the liquidation of his own stocks rather than those of his refiner-principal and he pointed that out as a reason why the refiner was losing the control which should be exercised by him in connection with the sugar.

They talked about the function of the broker in connection with the merchandising of sugar. Place also said that the broker, by reason of the peculiar system of sugar sale [fol. 1423] and distribution became the detached arm of the sugar refiner and that the refiner must rely on him for matters pertaining to the control, sale and delivery and that wherever the broker's interest was divided, as it would be in the instance of his having a quantity or direct interest in the sugar, his function as a broker was impaired to that extent. He stated further that the broker was employed for a certain purpose, the building of good will among as many customers as possible for the refiner, of selling sugar to as many customers as possible, and that when he himself entered into the role of a merchandiser he became a direct competitor of those customers and, instead of building good will, was impairing the position of the refiner with such customers who continuously complained that the broker was a competitor who was being put into a preferred position by being permitted to collect brokerage on the sale of the sugars which he was selling in competition with them, thus making him or granting to him what was, to all intents and purposes, a concession or rebate.

Paragraph 3 of Section V of the Code Interpretations adopted December 7, 1929, refers to the so-called "off-shore" sugars and also beet sugars which were sold by [fol. 1424] brokers who also represented the refiners in the sale of the sugar in common territory. At the Institute meetings, prior to the adoption of this resolution, it was said that the off-shore brokers who sold off-shore sugars were registering complaints with the Institute to the effect that other sellers of off-shore sugars were using them to promote the sale of the Institute members' sugars in an unfair and unethical manner. They would persuade the buyer to buy the refiners' sugar through various inducements in connection with the off-shore sugar they were also selling. These complaints were registered from time to time by Armstrong, Lowry and member refiners with respect to Edgar's inclusion of beet sugars with his sales of the refiners' sugar.

The sugar of the Institute members was being sold list price and practically all of the off-shore sugars were being sold below the Institute members' list price. There were allegations that these off-shore sugar producers had sold their sugars below their announced prices applying to those sugars. It was pointed out that this practice impaired the effect of the Code provisions that sugar be sold at open terms and prices publicly announced and was therefore in- [fol. 1425] directly defeating what the refiners had directly undertaken to do. The off-shore brokers were also employed by the refiners. In connection with the adoption of Code Interpretation V(4), it was pointed out that the broker, as the agent of the refiner, was expected to aid the refiner in selecting transportation routes and employing transportation facilities and to exercise his business discretion to get the best obtainable facilities and the best rates for the transportation of the refiners' sugar from the consignment points. If the broker had an interest in any transportation company his independence of action was impaired by such interest and ownership and it seemed proper to require him to maintain this independence as the refiners' representative.

Code Provision III(e) applies to the warehousing of sugar and reads:

"The storage of sugar in the warehouse in which customers or brokers are interested or with which they are in any way affiliated."

The reference to brokers was not included in the provision as originally adopted. The provision about brokers was inserted May 2, 1929. With the adoption of the resolution [fol. 1426] bearing upon this question there was added the word "broker" and the clause "or with which they are in any way affiliated."

In the latter part of 1928 these questions became of current importance to the members and as time proceeded the problem became more and more difficult. They had come to look upon this particular question as over-shadowing everything else with which the Institute was concerned at that time.

Place pointed out that unless something could be done to prevent these brokerage and warehouse practices, which were resulting in discrimination, concessions and affiliation and these practices handled in such a way as to enable the refiner to keep control of his sugar, the Institute might as well fold up its shop and quit. He thought that the fundamental purposes of the Institute were being so impaired as to make its effort in some localities practically useless unless this question could be met. This opinion was shared by practically every member.

Abbott pointed out that the broker and the warehouse were the extended arms of the refiner which enabled him [fol. 1427] to keep control of the sugars until they were sold to the buyer and that these agencies had to be depended upon in order that he could surely and effectively carry out the provisions of his contract and prevent discriminations, rebates and concessions which otherwise might attach to these transactions. He stated that if either one of the functions of these agencies was impaired by an interest in ownership with that of a purchaser or by an interest in ownership with each other, effective check of the refiner was impaired and, in fact, in some instances destroyed. Therefore, it seemed necessary, in order that this be properly handled, that they deal with their brokers only on the basis of a brokerage function.

In discussing the function of warehousemen reporting the withdrawal of sugar, it was pointed out that the time credit terms started, and the selling price, if there was a price change, were dependent on the warehousemen's reports, which were in turn checked by the broker and whenever the independence of either one of them was destroyed, by an

interest in ownership or affiliation, the check was impaired to that extent.

The function of the broker, as far as the warehousing of sugar was concerned, was the same except that it was more [fol. 1428] aggravated in the case where a broker owned his warehouse because the whole matter was in his hands and the cross check was entirely destroyed. The refiner had to depend entirely upon the integrity of the broker's reports as to whether the sugars were in fact being reported as they were withdrawn.

The Institute has adopted a form of warehouse non-rebating agreement and the so-called broker's pledge. The matter of the warehouse non-rebating agreement came to the attention of the Directors in February 1929. The broker's pledge was adopted in the late spring of 1930. The discussions about the broker's pledge continued over a period of several months. The real active interest began about August 1928. The broker's pledge was discussed at the Directors' meeting and it was pointed out again that some of the refiners had already exacted from their brokers a pledge that such brokers would not rebate any part of their commissions to the buyers of sugar and the practice was commended by certain other members of the Institute. It was recommended that all members attempt to secure a broker's pledge from all brokers.

At the various general discussions about broker's [fol. 1429] pledges and warehouse agreements, it was said that they would be necessary in order to prevent these discriminations, which were alleged to be resulting through concessions of either a part of the moneys that were paid for the brokerage or from brokers remitting in the form of rebates to buyers. It was felt that instead of relying upon the general provisions of the Code, which had been accepted by the brokers, there should be a further step requiring these brokers and warehousemen individually to commit themselves to the individual refiners in respect to these questions. It was likewise pointed out that this was another case in which the fundamental purposes for which the Institute had been organized were being defeated by the alleged unethical practices of certain warehousemen and brokers at various places. They mentioned particularly the practices of delayed billing and the fact that brokers engaged in merchandising business enjoyed a preferred position as compared with the regular customer.

There were many reports by various refiners of rebating by warehousemen. Practically all of the refiners in the Northwest had reports from their brokers and from vari- [fol. 1430] ous customers to the effect that certain brokers and warehousemen were making concessions in terms of service or direct monetary rebates for the purpose of securing business and that in some instances they were actually building up monopolies by this practice. Exhibit B-6 is a copy of the warehouse agreement as adopted.

Defendants' Exhibit B-6 was received in evidence.

After the agreement was discussed, it was submitted to members for their opinion and to some Chicago attorneys who dealt with the matter of warehouse practice. They approved it. Later it was submitted to our counsel, Sullivan & Cromwell, in New Lork, and approved. The Institute originally recommended that members secure such agreement from the warehouse that they employed, in February 1929, and some weeks later they began to secure them.

Moog pointed out that inasmuch as the refiners intended only to pay the warehouseman for warehouse services, if the warehouseman used any part of the payment which he received for such services and passed it on to the buyer in the form of a rebate, for the purpose of securing more business for the warehouse, he was in effect admitting he [fol. 1431] was charging too much for the warehouse services. He said a clause should be put in to the effect that

"If a warehouse shall at any time during the life of the agreement pay or concede to any customer of the refiner any consideration or rebate, the charges to the refiner for storage hereunder shall be reduced by such amount."

If he was found to be making a concession to the buyer from the amount that the refiner had paid him for storage service, the refiner would feel that he had been assessed that much in excess of the worth of his services and that he should be requested to reduce his rate to that amount. That opinion finally prevailed and was made a part of the agreement.

The Institute did not concern itself with the rate of storage. The refiner who negotiates with a warehouse fills in the rate. That is a matter of private negotiation be-

tween the refiner who uses the warehouse and the warehouse. The rate varies. The Institute has done nothing whatever to get these warehouse agreements signed except to follow up in the event that the refiner does not comply with the stipulation of the Code provision. The Institute does not go to the warehouse and ask it to sign. It has no contact whatever with a warehouse in relation to this matter. The refiner himself takes charge to see that the agree-
[fol. 1432] ment is signed. There was some reference to the adoption of the broker's pledge in the early days of the Institute prior to my connection with it. I began actively to interest myself in the matter during August 1929 at the suggestion of Judge Ballou. During August the matter was discussed at an Executive meeting and a tentative form drafted. It was found inadequate in some respects. I discussed with Lamborn, Cameron and some of Lowry's men the form of this broker's pledge and they all evidenced considerable interest in it.

Lamborn was decidedly in favor of it. He said he thought it was time someone undertook to define clearly the relationship between brokers and refiners, which had only been understood through custom and implication. He was finally in favor of writing these relationships and functions into the form of a pledge which every broker should be required to sign. Upon the return of Judge Ballou early in August a tentative form was submitted to various general brokers, such as Lamborn, Lowry, Minford, Louder, Meinrath and Edgar and their opinion and comments of this pledge with respect to its character was asked. Some replies were in writing and others were given verbally
[fol. 1433] but the one who took keenest interest was Lamborn. The Lamborn representatives talked to us at length and found further fault with the revised draft. We finally suggested to them that they undertake to give us their interpretation of a broker's function and what would be a suitable pledge to require the brokers to sign. They submitted a rather detailed form of pledge which was subsequently considered at a meeting of our Board of Directors and with some slight modifications was adopted and recommended to the membership. Lamborn wrote a letter to me on the subject November 25, 1929 (Exhibit C-6).

Defendants' Exhibit C-6 was received in evidence.

In my conversations with Lamborn he pointed out that he was under a certain obligation or commitment to the National Brokers' Association under the provisions of the Code which he had adopted. Under the Brokers' Association the particular obligation which he referred to was that of not splitting brokerage with any purchaser of sugar and not rendering any undue service for the sake of influencing business.

[fol. 1434] He said that other brokers actively engaged in selling sugars in common territory with him were under obligation to no code of ethics and he knew that they were not living up to the ethics which his association had him under obligation to observe. He said that unless something was done to put these competitive brokers under a similar obligation, he would probably have to resign from the National Sugar Brokers' Association in order to protect himself against what he alleged was unethical competition. That was the principal reason for his so aggressively urging upon us the adoption of a strong broker's pledge.

Exhibit D-6 is a copy of the broker's agreement as adopted and recommended.

Defendants' Exhibit D-6 was received in evidence.

The Institute had nothing to do whatever with the execution of these agreements by brokers. That is entirely between the individual refiner and his broker. We asked the refiner to have them executed and to file copies of the broker's agreement and the warehouse agreement with us. The [fol. 1435] final agreement of the brokerage provision reads:

"It is understood and agreed by and between the refiner and the broker that the refiner will secure from all brokers through whom it sells sugar a similar agreement."

That was the demand the brokers made in the matter. No one of these brokers wanted to commit himself to the obligation embraced in that agreement without assurance that the same would be required from every other broker.

I made it a practice to attend the meeting of the Directors and the Executive Committee and attended practically all the meetings of the Institute except some of these so-called Committee meetings. Occasionally there may be

some special Committee meeting on a question of transportation or something where I am not present. I have attended all the formal meetings of the Institute when I have been in New York.

At none of the meetings I have attended was anything said by any of the members as to what the price of sugar should be. No one ever said or suggested that the price of sugar be raised or maintained. No refiner within my hearing, either at the Institute or without, ever suggested to another refiner that he raise his price. I have never at any time or any place, with one man or more, at any meeting [fol. 1436] of the Institute, discussed or heard anybody else discuss the question of raising a price or maintaining a price, even by suggestion or inference, or in any other way. That subject was definitely taboo at the Institute. The answer which I have given applies outside of the Institute also.

None of the refiners have asked me to intervene with any other refiner with regard to his prices. I have never suggested to any of the refiners what they should do with their price. No other member of the Institute has done so with my knowledge or information.

[fol. 1437] LAMBERT V. B. CAMERON was called as a witness on behalf of the defendants,

Direct examination.

By Mr. Peck:

I am a broker dealing in refined sugar. My company's name is L. V. B. Cameron & Company. I have been in the sugar brokerage business since 1888.

I was recording secretary of The National Sugar Brokers' Association for one year, corresponding secretary for 5 years and president for 20 years. They created the office of chairman of the board and honored me with it. That is the office I hold at the present time.

The purpose of The National Sugar Brokers' Association is to define the qualifications, limitations and privileges of brokers in refined sugars and syrups, to maintain harmony between the brokers, the refiners and the buyers and to protect the interests of all by the establishment of rules and

regulations which will create a satisfactory distribution of domestic refined sugars in the United States. The organization was formed in September 1903.

We have a code of ethics. It is in our constitution as well as our application for membership. There are 350 members in the association. They comprise the leading sugar [fol. 1438] brokers. Membership in our organization is open to all sugar brokers. Exhibit E-6 is our present form of application. It evidences the requirements and standards of ethics of the Association. This particular form has been used for 3 years.

Defendants' Exhibit E-6 was received in evidence.

The resolution in our 1931 year book was adopted by the Association May 7, 1929. It was not a new principle. It was an unwritten law ever since the Association was formed. We did not and have not accepted for membership in our Association a broker who was merchandising sugar prior to that time. I signed the broker's agreement between refiners and brokers as set forth in Exhibit D-6.

The function of brokers in regard to paragraph 4 of Exhibit D-6, which provides that the broker will not divert to customers' warehouses or to any warehouse other than those shown on bills of lading, except when authorized by the refiner, is to follow the requirements of his principal, the refiner, and to carry out those instructions to the uttermost. He has no right to deviate in any way from the bill of lading. [fol. 1439] Paragraph 5 carries out the rule of years,—that if the broker signs, he follows the instructions of his principal, the refiner. It is the function of the broker to maintain the refiner's freight application.

Paragraph 6 provides that the broker will check consignment stocks and report irregularities. It has always been the function of the broker when he receives the consignment from the refiner to keep track of that consignment, check up on the warehouse deliveries and see that prompt return is made to the refiner of those deliveries. He acts as agent for the principal, the refiner.

Paragraph 7 provides the broker will not participate in any effort to collect unearned warehouse charges. The function of the broker is to do the very best he can as to charges and everything else for his principal, the refiner. He has to see that he gets the cheapest warehouse charges.

A great many warehouses have dealt direct with the re-

finer. I have not gone very much into that business because I do not get out there, but the refiner in a great many cases has made his own agreement with the warehouse and [fol. 1440] then the broker takes charge. In some outlying districts the refiner relies upon the broker to find the warehouse, and in that case he is expected to get the cheapest and the best facilities which will be to the advantage of the refiner in the distribution of his goods.

In the transiting of sugar a great many of the arrangements for transportation facilities out of consignment points into the outlying districts have been made by the railroad company and the refiner, but the broker is looked upon as the man to see that the cheapest rate and one which will make a satisfactory distribution of refined sugar in the country, is in force. He is supposed to do the best he can in getting the cheapest and most favorable transportation facilities.

Cross examination.

By Mr. Fly:

The broker enters a contract with his principal when he signs this paper. He must live up to the arrangements he makes. Prior to the time when the broker's pledge was signed, as far as I know, none of our members have been placed under the rules or regulations or code of ethics of any outside organization. When this pledge came to my attention I brought it before our board of managers and [fol. 1441] discussed it. The subject was discussed by our Association and they decided to sign it.

Petitioner's Exhibit 484 was received in evidence.

I am a general broker in refined sugar and syrup and occasonally do brokerage business in raw sugar. I represent all the eastern refiners in Philadelphia and New York.

I can mention specific cases where an application was rejected only on the ground that the applicant was a broker who merchandized. Brokers made applications and our Association rejected them. One of the cases is either the Federal Grain Company or the National Grain Company of Bridgeport, Connecticut, where the president of the concern applied for membership in the Brokers' Association and we turned him down. He applied to us as a broker and at the same time was able to buy sugar from the Fed-

eral Sugar Refining Company as a dealer. The applicant was not a refined cane sugar broker. He was president of a merchandising concern which dealt in refined sugar.

I also have in mind the case of Tait. We found that this man represented about 30 or 40 wholesale grocers and was wanting to buy the sugars and return the brokerage to [fol. 1442] these different concerns from which I understand he received a salary. That happened within about a year and a half or two years ago.

There is another case in Virginia or West Virginia, where jobbers got together to buy, where one man bought sugars and returned the brokerage to the different ones. That happened some time within 2 or 5 years.

I will say further that ever since the organization we have had many. I cannot bring them all up.

I think these organizations of purchasers are absolutely in violation of the Sherman Anti-Trust Law. They are not organizations of purchasers who want to make an arrangement so as to avoid the payment of brokerage. They want to make unfair distribution. They are organizations of purchasers who would like to get the benefit of the brokerage. That is the type which I have been describing.

[fol. 1443] Counsel for the defendants read into the record the form of application that was used by the National Brokers' Association in the year 1927. It read as follows:

"To the Board of Managers of the National Sugar Brokers Association:

Sirs:

—— hereby apply to be admitted as a member of The National Sugar Brokers' Association under the Constitution and By-laws of your Association. Should —— application be approved and —— be elected to membership in your Association, —— the undersigned, solemnly swear that neither —— firm or corporation or any member or stockholder thereof, nor any of —— employees, will give, pay, rebate or divert all or any part of the money or commission paid —— or —— firm by the sugar refiners for services rendered in the purchase or sale of sugars or syrups, directly or indirectly, in cash or its equivalent, or by any extra discounts in any other line of trade or class of merchandise, or rebate by subterfuge of any nature what-

soever, to the purchaser, or to any of their employees, or to any firm or individual designated by or connected with them, either directly or indirectly.

—— further pledge that no money or its equivalent or any inducement not considered legitimate by the Association shall be given, rebated or diverted by either —— firm or corporation or any of —— employees to any buyer or any officer, individual or firm, directly or indirectly, for the purpose of securing all or any part of the purchaser's orders for sugars or syrups.

—— also pledge —— to abide by the Constitution and By-laws, and agree to abide by Rules and Purposes of your Association now in force, as well as any that may hereafter become in force, and to report in writing to the Board of Managers any irregularity or fraud on the part of any member of the Association, that may come to —— knowledge, and will hold —— bound to appear before said Board, or any Committee of the Association, upon summons of the Corresponding Secretary thereof, and give testimony concerning any infraction or neglect of the Constitution and By-Laws by any member of the Association that may come to —— knowledge.

[fol. 1444] —— further agree not to pay or divert any part of the commission received by —— on purchases or sales of Refined Sugars of Syrups, to any broker, brokerage firm, or brokerage corporation, not a member of the Association, or pay or divert any part of such commission received upon the purchases of any buyer, to any person, firm, or corporation who is a partner, employee or stockholder in the business of said buyer, without the consent of two-thirds of the full Board of Managers, voted by ballot.

Yours respectfully, (Name) ——; (Record address) ——."

Notary.

[fol. 1445] EVAN T. FISHER recalled.

Redirect examination.

By Mr. Wyatt:

Section 1, paragraph 6, of the Code Interpretations was discussed at a meeting of the Executive Committee of the

Institute. We had received a complaint that Savannah sugars were being sold in Memphis, Tennessee, below its openly announced prices. We wrote to Savannah and asked them for the facts. They told us they had sold some sugar in that market, invoiced the buyer on their announced terms and the buyer had arbitrarily deducted 5¢ a bag, the difference between the rail rate and the barge rate, when he paid the invoice. They further stated that they were trying to collect the amount deducted. We cleared Savannah's reply back to the complainant who apparently was satisfied because we heard nothing further.

At the meeting this instance was brought up by Moog who pointed out that occasionally buyers made such arbitrary deductions which the refiner afterwards attempted to collect in good faith and that it would be helpful to the Institute in answering such complaints if we were advised when one of these deductions was made. If the Institute were already in possession of the facts, the matter could be hastened materially. After a great deal of discussion extending over a period of weeks, the Executive Committee [fol. 1446] made a recommendation to the Board of Directors which was adopted September 25, 1930.

I can only recall 3 reports made to the Institute of buyers who made these so-called arbitrary deductions. No member ever inquired about these instances when such reports were made.

I am in touch with the activities of the Institute in connection with investigations. Until recently I handled all the complaints and investigations requested. The Institute had 2 men whom it regularly employed as investigators and one whom it employed from time to time. I gave instructions to these investigators as to their duties with respect to the customers with whom warehouses and brokers were alleged to have been affiliated.

I have told all our investigators a good many times that their letter of authority applied only to the records of a refiner's broker or warehouse pertaining to the handling of that refiner's sugar; that the customer did not come under any of the provisions of the Code of Ethics and also that they had no business with the customers' records. I told them that when they were investigating an alleged broker-customer affiliation or an alleged customer-warehouse affiliation, if it was impossible to establish from the [fol. 1447] records or questioning of the warehouseman or

the broker, they should go to the customer and ask him if he had any objection to answering certain questions or showing them records which bore directly on the question of the ownership of that customer and of the warehouseman or broker with whom he was supposed to be affiliated.

These investigators, when investigating warehouses and brokers, were supplied with a letter of authority to show to the warehouse or the broker. I told them that under that letter of authority they had no authority of any kind or description to force any customer to show any records if they did not wish to show them freely. As far as I know, investigators of the Institute have not violated their instructions.

In 1930, at the request of the Executive Committee, I interviewed Heinz, or someone in his employ, in regard to a contract that was supposed to have been made with Lowry for the purchase of some sugars which had been tolled by Spreckels for Sullivan of Western. We were investigating Lowry's records in that connection because we were told that this sugar was not sold in accordance with Western's announced price and terms.

[fol. 1448] In no other instance have I requested any information from a customer of a refiner in connection with his books and records.

There are only 2 instances that I know of where our investigators requested information. They are instructed when they go out that if they have any trouble getting anything they think they are entitled to, to call us up on the telephone or wire us immediately and let us know what the circumstances are and then we will tell them what to do.

We sent Spencer out to get some information for us about 2 warehouses in Minneapolis and St. Paul. He telephoned me and stated that after checking certain records at the warehouse he was still unable to check a shortage in the refiner's stocks and needed access to certain records of the customer. I told him to request the customer for permission to examine these records. He called me back, said that the customer had refused, and I told him to send in his report and go on with his work.

The St. Louis incident was exactly the same situation. The investigator told us he asked the customer to see certain records which the customer refused. We told him to go on to the next investigation.

[fol. 1449] We had another case where a customer asked us to look into his records. We sent an investigator out there and he changed his mind and sent the investigator away. Then we received a third request to come and investigate his records and we sent the investigator out there a third time and the customer told him that he decided he would rather be a sugar merchant than a warehouseman anyway.

I have not sent out any of the investigators of the Institute and I do not have any information that investigators of the Institute were sent out to examine the books or records of anybody else in the trade except warehousemen, brokers and the customers I have described. I never investigated Willett & Gray's records.

Recross-examination.

By Mr. Fly:

We had a few complaints about the conduct of our investigators. The only complaints that have ever come to me have been from the refiners. We have had a complaint from National about the investigation of A. L. Johnson.

I do not know of any complaints against the Institute or its members regarding the methods used by our investigators in connection with their investigation of the books [fol. 1450] of customers or others in the trade. There were over 400 cases involving warehouses and 300 involving brokers. I do not recall receiving complaints in any of these cases.

I do not recall a single case of a customer ever complaining to us.

We never conduct an investigation unless there has been a complaint registered by a member and an investigation requested. We have a very specific complaint which we go out to investigate.

The Institute first decided the only way to arrive at the facts in any given case under dispute was to investigate. We tried 2 investigation agencies, one the Proudfoot Chinal and another, which proved to be unsatisfactory. At that time Proudfoot Chinal was employed on a basis of such much for an investigation. Later on we employed Chinal by the day because we sent him around the country. Then we employed Van Buren. He went to New Orleans. He

left us and we employed Anderson. The other investigator was Spencer. That is all there were. We never employed Van Buren and Anderson at the same time. Van Buren, Spencer and Anderson were on the Institute's payroll. [fol. 1451] Taylor made the first investigation. Patterson made 3 investigations.

Petitioner's Exhibits 485 to 487, inclusive, were received in evidence.

[fol. 1452] LOUIS V. PLACE recalled.

Direct examination.

By Mr. Wyatt:

There is no limit on the amount of sugar which McCahan would deliver on consignment or from refinery except on local deliveries made in the metropolitan district of Philadelphia, where the lowest limit is 7,000 pounds, which is equivalent to a truckload. The situation existed before the formation of the Institute. Our practice varies in different territories. We always leave the decision of the matter in the hands of the brokers who are handling our business in the different territories. In the territory outside of the metropolitan district, our brokers have submitted to us orders for retailers other than chain stores or department stores which we accepted but they were submitted to us very rarely. We tried to encourage our brokers not to do business with retailers. We did not consider it a good policy, for obvious commercial reasons, but if in any territory there is no prejudice against a manufacturer selling a retailer, and if that broker wants to do so, he may. It has been our experience, however, that they very rarely work out satisfactorily. McCahan has always followed this policy.

[fol. 1453] There have been discussions at Institute meetings as to recommendations regarding the amount of sugar which refiners will deliver to customers either from the refinery or consignment. The discussion was brief and it was obvious that we were divided into 2 camps, one believing that something should be done about it, to which camp I belonged, and the other camp believing that nothing

should be done about it. The matter was finally referred to counsel who advised us that it would not be a proper subject for Institute discussion and the matter was dropped as shown by the minutes of the Executive Committee of October 8, 1930. I do not recall it ever having been discussed thereafter.

A private brand is any mark belonging to the customer, whether copyrighted or not, used on any package containing sugar. The same grades which are put in the refiner's packages are put in brand packages. It is the same sugar.

Prior to the formation of the Institute, we had something which might be considered close to the refiners' practice of packing private brands. There were 2 wholesale grocers in Philadelphia who used barrels, on which we put our name and the name of our customers. That does not [fol. 1454] come within my definition of a private brand, but I wanted to mention it. We did not make any extra charge to the wholesale grocer. We do not perform that service today. The use of barrelled sugar had declined to the point where it seemed foolish to have this special brand so we called up the buyers and asked them if they would have any objection to our leaving the brand off. They were surprised to hear we were still putting it on and said they had no objection to having it left off.

In the period before the Institute, we had requests from customers for private brands. The customers who requested them did not make any offer to pay the extra cost involved. Usually, their idea was to buy private brands below the refiner's brand. We refused them because I have always felt that handling a private brand is a great expense, especially for a small refinery such as ours since our packing floor and shipping floor is already congested with a great variety of assortments. If we pack one private brand, we would practically duplicate the number of assortments on our floor. It would complicate our packing and our shipping and even increase our cost of carrying inventories. It would increase the different varieties of stock we would [fol. 1455] have to have in storage and empty packages and furthermore I felt that if we started packing one private brand, it would lead to similar proposals on the part of others, which would be embarrassing.

The main reason for not packing private brands was that wherever we had a chance to distribute sugar we wanted

to distribute our own brand so that it would become known. We did not want to advertise somebody else's brand.

I first heard private brands discussed at the Institute meeting of July 11, 1929. The subject was brought up by a letter which was discussed from the ethical standpoint and I expressed the view about packing private brands that I have just expressed here. It was decided to circulate Exhibit K-6 among the members of the Institute.

Defendants' Exhibit K-6 was received in evidence.

As a result of the circulation of this letter, members made suggestions which were discussed at a subsequent meeting. The questionnaire dated July 19 was subsequently sent [fol. 1456] out to the members.

Defendants' Exhibit L-6 was received in evidence.

At the meeting of November 14, 1929 the same arguments used by myself and others at the previous meeting as to the uneconomic features of packing private brands were gone over again, but it was obvious that here again we were divided. Some agreed with me but some felt the private brands were a good thing and they wanted to continue them. It was obvious we could not arrive at any unanimity of opinion. We spent a lot of time on this subject and finally the suggestion was made that if there was to be any extension of this practice the Institute should have notice of it so that those members who felt that some action should be taken against private brands would have a chance to bring the subject up again and try to convince the other members that such action was proper; also, if necessary at that time, to consult legal counsel. I wanted a recommendation to be made, but it was impossible to arrive at any unanimity of opinion because there were some of the others present who felt that such a recommendation was not right. Following this meeting, Imperial reported that they [fol. 1457] intended to pack private brands. At that time I tried to argue that some action should be taken by the Institute to prevent the packing private brands, but I got nowhere.

Cross-examination.

By Mr. Rice:

Referring to the minutes of the meeting of August 1, 1929 at which private brands were considered, we had dis-

cussed the subject from start to finish and back again and had not arrived anywhere. It was argued that the status quo be maintained until the next meeting when we should continue the discussion. Prior to that time we were free to pack private brands as we wished. During the month the members agreed not to start packing any new private brands.

At the Executive Committee meeting of August 3, 1929 there was a further general discussion again regarding the economic features of packing private brands and everybody, with the exception of Moore of Texas City, agreed with me that it was not desirable. He stated that he had no intention of spreading the packing of private brands but they were going to hold on to what they had. Spreckels said they believed that packing of private brands was a [fol. 1458] very poor practice but, notwithstanding, they might follow it. With the exception of Moore, all agreed it was an uneconomical form of doing business. They did not think it was a proper way of doing business and they did not intend to follow it. There was no statement that they would not take on any new account or anything of that kind.

Referring to page 396 of the Executive Committee minutes of February 27, 1930, the rule was adopted that exclusive brands would not be packed without notice to the Institute so as to give a chance for further discussion. I tried in every way that I could to convince them of the fact it was not good economy and I think I convinced them all, if they were not already convinced before I started.

Referring to page 402 of the Executive Committee minutes of March 22, 1930, it is my recollection that when we found we could not arrive at any opinion we desired, before the practice spread, to be given a chance to discuss the matter again and convince the membership that a recommendation on the subject should be made. It was natural, therefore, that for that purpose the place to report it would be the Directors' meeting, so a discussion could be had on it.

Redirect examination.

By Mr. Wyatt:

Two evils in connection with the packing of private brands were pointed out at the meeting of August 2, 1929.

[fol. 1459] The first and foremost was that it was a physical impossibility to offer to pack all private brands to all customers. It would be physically impossible for a refiner to pack private brands for everybody who asked for it and therefore it was discriminatory. The second was that it was a special service without appropriate charge and under the Code of Ethics was objectionable. I think others agreed with the statement I made about the probable evils.

[fol. 1460] FRED G. TAYLOR recalled.

Direct examination.

By Mr. Wyatt:

The first discussion at the Institute concerning the class of customers to whom refiners should sell came up at an Executive Committee meeting on November 27, 1928. The question had arisen as to whether it was discriminatory for refiners to sell to some retailers and not to others. There was a brief discussion, during which Judge Ballou pointed out that there was no provision in the Code of Ethics which dealt with such a question and that no action could be taken.

The same question was again discussed at a Directors' meeting on May 29, 1929, at an Executive Committee meeting of July 18, 1929 and one subsequent meeting, but no action was ever taken.

Defendants' Exhibits M-6 to O-6, inclusive, were marked for identification.

In my work as vice-secretary I have had contacts with the importers of off-shore sugars. Lamborn & Company, importers of Cuban sugars, sold under the name of "Vizcaya." Lowry & Company, also importers of Cuban sugars, [fol. 1461] sold under the trade name "Limones"; L. W. & P. Armstrong, dealers in insular importations from Porto Rico, sold under the trade name "Sno White" and H. H. Pike & Company represented Hershey in Hershey's importations from Cuba. These firms also acted as brokers for domestic refiners. The importation of off-shore sugars

has substantially increased from 1926 to the present time. They are sold principally in the eastern, lake port and gulf port markets to the same identical class of customers to whom the same firms sold the domestic refiners' sugar.

The Institute received statistics from off-shore importers from time to time and has furnished them with its statistics. At the present time we receive all of their announcements and supply them with all the announcements made to refiners. We did not receive such announcements from those 4 firms in the early days of the Institute. Late in 1929 Armstrong and Hershey began to send their announcements of all changes of the Institute, the same as the refiners. We in turn supplied them with the announcements which we circulated. In the first year Lowry and Lamborn did not send their announcements nor did we send announcements to them.

[fol. 1462] I received and answered frequent requests from off-shore brokers for information.

Frequently I had complaints from off-shore producers that other off-shore producers were varying from their announced terms and prices. I received such a complaint from the firm of L. W. & P. Armstrong in 1929. Upon receipt of Exhibit 363-A I communicated with Bass, author of the letter and active manager of the Armstrong Company, regarding the alleged unethical practices of the Lowry Company which he said was selling below its announced price. I told Bass we would see if we could not get these people to follow the practice which was being followed by himself and Hershey and openly announce their price and term changes and report them to the Institute.

I suggested to the Executive Committee that we try to get these people to follow the practice of openly announcing their prices and reporting them to the Institute. I telephoned Lamborn and Lowry and told them of the complaints made by Bass and of his desire and of the desire of the Institute that their prices and terms be openly announced and reported to the Institute in order to eliminate misunderstandings and suspicions. Both agreed to do that. I told them that the purpose of the Institute in obtaining these announcements was to keep prices and terms open so that everybody knew what his competition was. I wrote to [fol. 1463] Bass and told him of the result of my efforts (Exhibit 363-D).

Exhibit 364 is the next communication which I had about this question from Armstrong. I did nothing after receiving Exhibit 364. I looked upon it as a sort of advisory communication and made no reply. The next communication I received was Exhibit 364-A. I immediately called Bass of Armstrong and asked him to withhold taking any action which would project us back into the pre-Institute disorder of the sugar business until I had an opportunity to confer with Lowry and Lamborn. Bass said that it was a matter of immediate importance to him, that he must have a reply immediately or he would withdraw his support from the Institute and proceed to make sales arrangements contrary to the provisions of the Code of Ethics. I urged him to stand by until I could discuss this with these gentlemen. He said that he would and I again got in touch with Lowry and Lamborn. I discussed this matter at some length with Lowry. I referred to my previous request that he openly announce any changes in his prices or terms and reminded him of his assurance that he would.

I then referred to the 3 matters complained of by Bass, first, that Lowry had departed from his openly announced prices. I refer to this as "openly announced" although it was a regular clearance of information from Lowry to us. [fol. 1464] Up to that time Lowry and Lamborn furnished us with their announcements upon our request only; second, that he had not followed the freight applications which we had reported to Bass. Lowry told us he had; third, that there were certain openly announced trucking practices which had been reported by us that were being violated.

Lowry assured me that it was his continuous purpose to cooperate with the Institute and I asked him to tell me what his practices were. Bass had stated that Lowry had announced delivered prices in areas that had been announced by refiners and subsequently had sold sugars at those points at other than the delivered price rates announced. Lowry said that he had sold his sugars, at such points as he sold, within the so-called delivered price area, at prices which were announced from time to time by the refiners. This inquiry arose some 6 months after the delivered prices had become effective in the territory in which

Lowry sold. I asked him what his trucking practice was and he said he was not clear and that he would have to confer with some of his associates and tell me later. I did not discuss with him at this time about storing in brokers' or customers' warehouses. I asked him to an- [fol. 1465] nounce the freight applications on which he himself was selling sugar to the trade.

Afterwards I had a conversation with Lamborn and George Wright, one of his assistants. The conversation I had with them was almost identical with that which I had with Lowry. I told them, I wanted to secure information covering their prices, terms and freight practices to give Bass in order that he might feel satisfied and refrain from withdrawing his cooperation and going back to unethical practices of pre-Institute times. We discussed trucking allowances and Lamborn told me what they were doing. We discussed delivered prices. Lamborn said that it had been their practice at all times to follow them. I told him Bass complained that at certain up-state points where they had announced a delivered price selling basis, that they had sold at other freight applications. Lamborn denied this. He said it had been their continuous policy that year to apply delivered price bases wherever they sold in the so-called delivered price area.

After the conversations with Lamborn and Lowry, I reported to Bass the statements which they made regarding their practices in the matter of selling under-delivered prices, their trucking practices and that they had not in- [fol. 1466] tentionally deviated from their announced selling prices from time to time and that they thought those misunderstandings had grown out of their having had a different differential in different parts of the country upon a few occasions. I gave him especially the announcements of Lamborn and Lowry with respect to delivered prices and to trucking, the things which Bass had complained about. He said it sounded all right but that he had been disappointed so many times by these verbal transmissions of reported practices of these other off-shore fellows that he would not be satisfied until we could secure for him a statement over the signature of these respective companies. I tried to dissuade him from this position, feeling that it would be somewhat embarrassing for me, but he was insistent and before a half an hour had passed he had a written

document in my office renewing the demands which he had made over the telephone (Exhibit P-6).

Defendants' Exhibit P-6 was received in evidence.

Upon the receipt of that letter, I addressed the Lamborn and Lowry organizations regarding the matters which we [fol. 1467] had discussed, my object being to get them to confirm the things which they had stated to me on the previous day and which I had reported to Bass. I therefore drafted a letter reiterating to both of them the substance of my motive, which was the attitude of the Armstrong Company. I followed the substance of the letter which Bass had written to me in the formation of my letters to them. Exhibits 343 and 324 are the letters which I wrote to Lamborn and Lowry. They are identical except for the addresses. Exhibits 324-B and 324-C and 343-A and 343-B are the replies I received to my letters and I showed them to Bass. He stated he was glad to have the information in this definite form and would continue to sell his sugar on the basis of open prices publicly announced.

Since the time of this exchange of correspondence and these conversations, these 2 firms have furnished the Institute with announcements of prices. They had not furnished them up to that time except upon our special request. Since the date of our correspondence and my conversations with them I have furnished them with the price announcements of the members of the Institute relayed by us to them.

Prior to November 30, 1929, the date of this letter, I [fol. 1468] never discussed with Bass or anybody in the Armstrong organization the price differentials on which they should sell their off-shore sugar. The conversations I had with Lamborn and Lowry were before the date of this letter.

I wrote Exhibit 389-M. Henderson asked me for the information which I, in the letter, was seeking to obtain from Pike & Company. At a meeting just preceding that date Henderson made a complaint regarding Hershey's offer to repurchase returned bags. He had also referred to retail selling practices which were alleged to have been carried on by the Godchaux organization in certain southern territory and stated that he was disturbed by this apparent departure from the old and customary practice of

selling only to wholesalers in that district. I reminded him again that there was nothing in the Code of Ethics which warranted our dealing with this question.

At his request I wrote Exhibit 389-M to find out whether or not it was true. Exhibits 389-N and 389-O are Hershey's replies. Exhibit 420-D-1 is a copy of the letter which I wrote relaying that information to Henderson.

I wrote Exhibit 457-O-1. The Institute does not have terms as to prices and freight applications. When I [fol. 1469] stated there were no terms I meant there were no terms other than those in the Code, if they be called terms. When I used the word "terms", I referred to the section of the Code which is headed "Price and Terms".

Cross-examination.

By Mr. Fly:

At the time Exhibit 457-O-1 was written, the announced selling terms at Birmingham, Alabama, were barge on carload deliveries and New Orleans all-rail rates on less than carload deliveries. That application had been announced some months prior to this time by refiners selling in that district and Hershey had made a similar announcement.

At this early time we were not receiving written announcements from Hershey. I knew it was their announcement because of our frequent contacts with their organization. From time to time Hershey's representative came to the Institute's office to discuss announcements which were made by various refiners to be sure that they understood them. Whenever they entered a new territory they inquired as to what such and such a freight application was in that territory and indicated they were interested in applying the same freight applications to those given points [fol. 1470] as those that were from time to time announced by the refiners.

This particular letter went to the point of discovering whether they were selling at what we thought was other than their open announcement at that particular point. We were not interested in their price or their application beyond knowing whether they were selling according to the application which they had announced.

Petitioner's Exhibit 488 was received in evidence.

[fol. 1471] EVAN T. FISHER recalled.

Redirect examination.

By Mr. Browning:

Since joining the Institute, I have handled a great many matters having to do with consignment points. The subject has been under my direct supervision since February 7, 1928. I have prepared Exhibit Q-6, a statistical study of consignment points.

Defendants' Exhibits Q-6 and Q-7 were received in evidence.

In making the 1927 map we obtained a special report from the members of the Institute. In making up the one of 1930, we took the regular warehouse list as a basis for the points at which consignments were carried.

The Institute has made various recommendations regarding consignment points at different times. There were three principal areas for which we made three major recommendations. The first one was made for the northeast territory of the country to cover the New England states, Pennsylvania, New Jersey, Maryland, West Virginia, Ohio and the lower part of Michigan. Indiana and Virginia were added later. The second major area was the southeastern part of the country. The third major area was the middlewest from about Kansas and Missouri north [fol. 1472] and including Illinois and Wisconsin.

At the time the Institute was formed a consignment committee was appointed and it made a recommendation on February 7, 1928 (Exhibit 447). On February 21, 1928, the Executive Committee recommended the adoption of this report with certain changes and on March 15 the Board adopted the report as applicable only to northern territory. A great deal of confusion resulted from the question of what territory was covered. The purpose of Code Interpretation X, which refers to "Definition of Southern Territory", was to define southern territory for consignment purposes only. It grew out of the indefiniteness of the Committee's original report which showed what was excluded. At the same meeting the Executive Committee also stated that the previous recommendations did not cover southern territory and defined territory. Indiana was added in May. There were very few later changes in the

recommendations. If a refiner added a point the recommendation was not changed except in one case. On June 27, Toledo, Akron and Columbus were eliminated and Cleveland and Cincinnati kept. On September 12, 1929, Fort Wayne was eliminated and on September 25, 1930, Toledo [fol. 1473] was added again. June 21, 1931, they recommended that Evansville, Indiana, be taken off the list.

The second area was southern territory. The first minute on it is the one of March 15, 1928, when the Board decided that it was not covered in the original recommendation. The first effort to eliminate the consignment points in that area was on March 11, 1929, at which time the Board of Directors appointed a Committee to study the consignment point situation and render a report. That was called the "Southern Consignment Committee." The memorandum report (Exhibit 451-C) was submitted April 24 and considered by the Board of Directors May 2, 1929. That report, even in spite of the definition of southern territory, did not cover the whole area. It covered only the real south, with the exception of North and South Carolina. There were frequent discussions of the matter and several recommendations were made during 1929.

(Defendants' counsel pointed out the following evidence regarding committee action on the consignment situation.)

Mr. Browning: On June 13, the effective date for Arkansas, Oklahoma and Texas was postponed, the report other- [fol. 1474] wise to become effective June 15. That meant roughly, the states covered in the Southeast, south of the Mason-Dixon Line, but east of the Mississippi River, except Louisiana. At the meeting of August 2, 1929, Savannah made its protest about the conditions in the South, and at that time the program was suspended. Then, there was a special meeting of refiners held on August 21 and 22, 1929, to discuss not only consignment points but the other matters which Savannah had on its mind. The minutes of that meeting are in evidence as Exhibit 451-X. As part of the results of that meeting, as is shown by the minutes, the consignment point program was reinstated and the special committee which was appointed, functioned thereafter. It was a committee consisting of Cody, Worcester and the officers of the Institute as shown by Exhibit 451-X. The liquidation of stocks at consignment points which were to be discontinued in the South continued during the fall

of 1929, and on January 16, 1930, the Board recommended that stocks at all discontinued points be removed or liquidated by February 20. On November 14, 1929, Oklahoma was added, and on March 13, 1930, a recommendation was adopted as to consignment points in Texas.

[fol. 1475] The third area is the northwestern area: Iowa, Kansas, Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin. No recommendation has ever been made for Illinois. Exhibit 447-Q and 451-K dealt with the South. These recommendations, taken together, cover the entire country with the exception of the eleven western states, Arkansas, Illinois, Missouri and the Upper Peninsula of Michigan.

Direct examination.

Mr. Browning resumes:

The Institute made no recommendations as to the eleven western states because they had practically no consignment points. There never were any. No recommendations were made for Arkansas, Missouri and Illinois because of the refusal of Godchaux to consider those states.

A consignment point is a point at which a refinery carries a stock of sugar either for carload or less than carload delivery locally or for delivery to points beyond to all of his customers. A reconsignment or storage-in-transit point is a point where a refiner carries a stock under the provision of a carrier's tariff for forwarding only in carload lots beyond or for delivery locally by switch movement of the [fol. 1476] carrier in a carload lot. The difference is that from a consignment they will make l.c.l. deliveries to anybody and from a storage-in-transit point there are no local deliveries except in carload lots. The definition is a matter of common knowledge.

Birmingham and Holt, Alabama, are purely reconsignment points. Indianapolis is a consignment point for both purposes. The Institute only made recommendations for reconsignment points as contained in the Southern Consignment Committee's recommendation. They have never been considered in the other two areas. It was made in the southern territory because the carriers' tariffs do not permit storage-in-transit. The only places where it is permitted are certain points on the Government Barge Line. There are very few points. The recommendations included

all storage-in-transit points which were in use at that time.

A reconsignment warehouse is a warehouse in which stocks are carried under the carrier's storage-in-transit provisions for forwarding to points beyond. It is a warehouse at a reconsignment point. We listed reconsignment warehouses in our warehouse book merely as a matter of information as to which warehouses were being used in [fol. 1477] those points.

The term "port of entry" was first used in connection with consignment points in the report of the Southern Consignment Committee. The term "port of entry" caused confusion. There was no definition of what a port of entry was. They merely named certain cities and called them ports of entry, but they were nothing but consignment points that happened to be on the sea-coast. The cities of Mobile, Savannah, Charleston, Norfolk and Pensacola were designated in the report as ports of entry and are defined as "ports where members may sell at the same prices as in sales to purchasers located at refinery points." That is a mistake. There have been freight applications up to very recently at every so-called "port of entry" which is named on that list.

From July and September, 1929, when the discussions came up at the Institute regarding the matter of Wilmington, I talked with Ballou and Taylor. Savannah threatened to re-establish consignment points unless Wilmington was eliminated. They did not want any stocks there. Hershey, on the other hand, maintained that the recommendation of the Southern Committee did not preclude them from carrying stocks in Wilmington and shipping to points beyond, as they had always done. The Institute agreed with [fol. 1478] Hershey.

In the question of the equalization of stocks, difficulties arose in some instances with regard to the elimination of the consignment of stock once it was decided to abandon a consignment point. The difficulty was that the stocks carried at that point by various refiners were not equal. One might have a very large stock, another a very small one. If all shipments were stopped at that point the refiner with the small stock would be out of sugar before the refiner with the big stock. The problem first arose in connection with the southern situation in September 1928. The Institute appointed a committee which consisted of Worcester, Cody, Ballou and Taylor. The committee asked

each member to report the stock on hand at the points which were to be eliminated. They were to find out what the largest stock at any of these points was and, under the program as it had been laid out, each member was to ship enough sugar to equalize the largest stock, so that theoretically they would all be exhausted at the same time. The Institute acted as a clearing house for the information we received from time to time. We collected the reports show-
[fol. 1479] ing the amount of stock on hand and sent it to the members, showing which stock was the largest. The equalization plan was also used at Fort Wayne and Toledo. I personally had charge of collecting and disseminating the information and sending out the reports. We did not discuss it with the refiners. They had adopted a program and set up the machinery in the Institute to see that it went through. I never told any refiner that he could not ship to any point more than he wanted or more than the amount stated in this equalization program. I never heard anyone else at the Institute doing it. I prepared the second sheet of Exhibit 447-Z, a notice to members of the Institute dated November 18, 1929, with reference to equalization at Fort Wayne and Toledo.

The equalization process had been going on at Toledo prior to July, 1930. In July, 1930, at Toledo, they had just about cleaned up the stock which was about the biggest one there at that time. Post of National appeared at the meeting and said he was going to re-establish Toledo and did so. The Board finally recommended that Toledo be re-established as a consignment point.

Toward the end of August, 1928, Great Western, the beet
[fol. 1480] company, and C & H announced a 5¢ service charge on l.c.l. deliveries in guaranty territory. The Institute members followed in that territory. Following the recommendation made at a directors' meeting on September 23, 1928, all members announced a service charge of 5¢ a bag on l.c.l. deliveries from consignment. The service charge was first withdrawn in Texas between September 20 and September 26, a week later, but continued in the rest of the territory.

Numerous complaints were made by members during the next two months about this service charge and how it operated. In each case it was urged that the addition of this service charge merely put a premium on the delay of reporting until they could get a carload accumulated. The

service charge was withdrawn in guaranty territory between November 12 and 15, 1928, by all members but was continued in non-guaranty territory. It was discussed several times in December and on January 4, 1929, it was withdrawn in all territory.

I was in charge of the printing of the Code Interpretations. Interpretation VII-3 was not deleted until the printing of May 1, 1930, because we did not always take Inter- [fol. 1481] pretations out as soon as they were obsolete. We waited until we got enough to make it worth while to have them printed. Code Interpretation VII-3 died January 4, 1929, but there was no recommendation ever made rescinding it. It was marked "Deleted May 15, 1930," because that was the time of the printing.

It had already been deleted in the printing of May 1, 1930, but on May 15, 1930, we published our Code for the first time as a loose-leaf binder. On May 15, the Board went over the entire Code of Ethics and approved it as it stood at that date.

Section X, paragraph 1, of the Code Interpretations is not correct because we include Colorado and Arkansas but did not include the lower part of Michigan and Texas.

I prepared Exhibit S-5. The information for 1927 and 1928 was obtained specially from the refiners. The information for 1929, 1930 and 1931, was taken from our records. The figures for December 31, 1927, were taken from the lists of the refiners' consignment points as of those dates. They were given to me a year ago for the purpose of making up this table.

[fol. 1482] Defendants' Exhibit S-6 was marked for identification and Exhibit T-6 was received in evidence.

The chart includes only cane sugar refined by members of the Institute. The weekly average of the consigned stocks is two and one-half million bags for the second half of 1928 but the lower weekly average deliveries from consigned stock is for the whole year 1928. Where I give the figures in bags it means 100-pound bags and where sugar has actually been delivered in other forms, it has been converted into 100-pound bag equivalents.

Defendants' Exhibits U-6 and V-6 were received in evidence.

The figures in Exhibit W-6 were taken from the regular records of the Institute.

Defendants' Exhibits W-6 and X-6 were received in evidence.

The figures in Exhibit X-6 also came from our regular records. The first column covers the total deliveries from all sources. We did not have figures for deliveries ex-con-
[fol. 1483] signment. Prior to the time the Institute made its recommendation for North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa and Wisconsin, I made studies of the situation in those states and participated in discussions with the Institute staff. We did not approve the recommendations which were made. We made them because it was the best compromise that could be reached with different people. We thought there were entirely too many points. The same situation was true of Texas. All Institute recommendations on consignment points were adopted by the unanimous vote of members. If one member voted against a recommendation, it failed to pass. Refiners added dozens of points in addition to those recommended after this recommendation had been adopted. When they added these points, they sent in a 6 day notice that they intended to store in a warehouse at that point. They were handled exactly the same way as where there were consignment points. Refiners went in at any time in any territory where they so desired.

We never told a refiner that he was restricted to a certain number of consignment points with the exception of Taylor's letter on January 13, 1930, with regard to the northwest area.

[fol. 1484] I was in charge of these sheets and the terminology "No restriction" is mine. I meant there had been no restriction on the subject of cutting down the number of consignment points. It was my practice to show on these sheets the points recommended and the points added by members. We were trying to show the number of points actually in use. There was a recommended point in Pipestone, Minnesota and only one refiner was using it. He told us he had stopped using it and we took it off the recommended list. The process was gradual. If we show the original sheet plus the last supplement, we show everything. Some of the supplements may have taken off points and some added points. Points were taken off in Wisconsin

because Texas City ceased operation and took stocks out of a number of points. In other states I have no way of knowing why a refiner discontinued a consignment point. They just notified us they were no longer consigning to that town and we took it off.

I participated in many discussions of consignment points with refiners and have been present at all meetings since 1930. I have never heard the statement that a refiner could not add consignment stocks and have heard many refiners state they were going to add them.

[fol. 1485] I have studied the question of consignment point expense since the middle of 1928. The principal elements are storage and handling charges, insurance and carrying charges. Carrying charges means loss on investment. There are a number of small items such as overhead, which includes the cost in the refiner's office of keeping track of these consignments. There is an item of damage for reprocessing sugar that has become hardened in consignment warehouses. The storage and handling charges amount to an average of about 6¢ for the first month. 3½¢ of that amount consists of handling charge and 2¢ to 3¢ the first month's storage. The handling charge is for unloading from the car; piling the sugar in the warehouse; unpiling it it and putting it in the car when the truckman hauls it out. Storage and handling charges are assessed on each bag of sugar. It does not vary with the volume so every bag costs that amount. Carrying charges are computed as follows: Take the average cost of a bag of sugar at 6¢ and divide that by 12 to get the average cost per month. Turnover affects carrying charges because the extent of the carrying charge depends on how long the sugar is in consignment. [fol. 1486] I have made a calculation of the turnover for the industry by dividing the total consignment deliveries by the average consigned stock. In the year 1928 there was a turnover of 10.2 pounds per bag; 1929 9.8 pounds; 1930 9.6 pounds; and 1931 7.8 pounds. We have on the average about thirty million bags delivered from consignment each year and our average consigned stock on hand at any time is roughly three million bags.

An average turnover of ten times a year means a considerable portion of sugar has to pay a second month's storage. The second month's storage runs between 2¢ and 3¢ per bag, irrespective of volume. Taking 6¢ as the first

month's storage and assuming that a third of the sugar is going to pay the second month's storage, actual storage costs 7¢.

The refiner pays the same storage and handling charge whether it stays 1 day or 30, and if it stays 1 day the second month he pays the whole month irrespective of whether it is the first or the second.

Petitioner's Exhibits 489 and 490 were received in evidence.

[fol. 1487] FRED G. TAYLOR Recalled.

Direct examination.

By Mr. Browning:

My statement in Exhibit 366 that

"You will therefore immediately confine your shipment to such points"

was made under a misapprehension. We had been discussing the consignment point matter for some time past and it was in my mind that it was decided that when this list was ready the refiners were going to adopt it. Therefore, I sent out this letter as what I assumed was a routine matter, but at the meeting of January 16, 1930, I was severely criticized for having issued this letter and for having assumed that it was my prerogative to tell these refiners when they should cease shipping to a consignment point. Worcester and Hoodless both joined in the criticism that it would have been appropriate to state what I did state in the latter with the exception of this mandatory clause, which I was not authorized to make. I prepared the minutes of this meeting at which I was criticized but I did not mention this rebuke because I did not want to make a permanent record of my shame.

In Exhibit 447-Z I stated

"Each refiner interested in that market will be privileged to ship sufficient sugars to take care of current business with the understanding that they shall not exceed a stock of eight hundred bags at any time."

I made that statement because the refiners had definitely [fol. 1488] decided to withdraw this consignment point, and had decided upon the process by which the withdrawal should be made. We were merely instructed to report the statistical clearances with respect to withdrawing in this way and that their purpose was to maintain competition at these points until everybody was out. One refiner had very substantial stocks, while others had practically none, and, if they withdraw the consignment point without the opportunity of equalization, the market would be entirely in the hands of the one who had the large stock, in so far as consignment delivery was concerned, until his stock was depleted. The privilege that I mentioned here simply meant that under the plan that they themselves would arrange, they were privileged so to do. It was not in our hands whatever.

Cross-examination.

By Mr. Fly:

Under the arrangement which the refiners had made themselves, they were privileged to do this.

In Exhibit A-2 I state "My attention is called to the last paragraph." Abbott, of American, called my attention to that. I think the first page there is my reply to the Lamborn letter of December 6, 1929, Exhibit 323-A. I had no [fol. 1489] occasion to answer it until this question arose. I simply circulated the letter when I received it. Exhibit 332 appears to be another reply. I did not tell anybody that I had written the reply of December 10. As far as I told them, my circular of December 12 was the only information I gave them as to my reply to the Lamborn letter.

[fol. 1490] CHARLES B. CASTLE Recalled.

Redirect examination.

By Mr. Browning:

I have been in charge of all of National's consignments and for the past 3 years I have been in charge of western sales.

A direct shipment has several advantages over a delivery from consignment in the distribution of sugar. It gives the trade fresher sugar and in packages in much better physical condition. At the same time it saves carrying charges for the refiner. Normally our customers order their sugar 4 days in advance. In exceptional cases we make 24-hour deliveries by reconsigning from transit stocks. Prior to 1925 we maintained a consignment stock at the largest strategic points throughout our territory, the purpose of which was to serve an area, although once those stock-were established, deliveries were made to the local trade as well.

The consignment stock situation changed in 1925, 1926 and 1927. Numerous consignment points were opened at many small points. They were different points from the ones where we had been carrying because they were solely for the use of the local trade. We established them because of competition. The refiner who put his stock in there had [fol. 1491] the additional sales argument that he could give better service and the buyer had less investment in sugar. As a rule National did not obtain a competitive advantage by putting in those local stocks because competitors did the same thing and the preliminary advantage was lost. The reason we could not withdraw from these consignment stocks that were established was because several of our competitors also had stocks there. Usually the refiners' stocks at any point are much greater than the local stock of the trade. The refiner cannot judge the requirements of the trade nearly as well as the local jobber or manufacturer and consequently some of the shipments are very difficult to control. Generally, the sugar stored there was greatly in excess of the needs of the community.

I have examined Exhibit V-6. In the absence of refiners' consigned stocks this amount of sugar would not be carried by the trade. These are unusually large stocks for the stores of some of the communities. Normally a jobber carries a week's supply of sugar. I have never known a jobber to carry stocks of this quantity. When a consigned stock is eliminated the trade secures its sugar by direct shipment from the refineries, and in emergencies, recon- [fol. 1492] signs shipments from a consignment point. If we would eliminate the consignment points in Illinois, stocks would be carried at Cairo, Mounds and Chicago. We ship sugar from intermediate consignment stocks located in

cities such as Indianapolis. The stock is small to begin with and the shipment is not sufficiently varied so that a car might be consigned to another point. It is frozen for that particular locality. If the local community won't use that sugar either the stock deteriorates or it must be moved to some other point at considerable expense. The cost of moving one of these stocks is usually at a local rate and is high in comparison with the through rate. National carried consigned stocks in only a small percentage of the communities in which it sold sugar.

Outside of the metropolitan area our customers usually take deliveries by the carload. In the eastern territory the minimum is 40,000 pounds or 400 bags. In the western territory it is 60,000 pounds or 600 bags. That is not a large quantity of sugar for a customer to purchase. That would last our average customer about 1 week.

We frequently ship pool cars to customers. Customers at consignment points do not always take deliveries from [fol. 1493] the consigned stock. Frequently they order cars for direct shipment to their place of business. It is not because of variety or advantage of freight rate. They prefer to have the sugar shipped that way rather than take it from a consigned stock. They do not get as quick deliveries and if there is need of an immediate delivery they won't do it. The advantage is that they get a fresher stock and save by not having to go to the warehouse to get the sugar. At consignment points deliveries are made f.o.b. warehouse and if the customer wants it he will have to truck it from the warehouse. If the customer has a siding, the sugar is placed on it.

I have never heard of any Institute recommendation regarding reconsignment points in National sales territory. We have several purely reconsigned stocks. Columbus, Ohio, is an example. "Purely reconsigned stocks" means we do not make direct deliveries. We will deliver a carload lot to a local buyer by switch movement but we will not make an l.c.l. delivery.

I do not know of any instance in which any one has told National that it could not open a consignment point not recommended by the Institute. National has added consignment points not recommended by the Institute. Rochester, [fol. 1494] New York, is an example. We did it because we thought it would give us a sales advantage. It did not be-

cause the other refiners immediately put in stock and we were back to where we started with the exception that we had some additional expense to pay. It gradually dawned on us that wherever we went the other refiners would follow.

I am familiar with the equalization process used in the abandonment of certain consignment points. We adopted that process because we felt it would maintain our position in our market while the liquidation process was going on. It provided all refiners, who were storing at the point which was to be abandoned, with stock as long as anyone else had stock there and in that way preserved competition. In the course of this equalization process the Institute acted as a clearing house for the statistical information which enabled the process to work. I never understood the Institute was telling me whether I could or could not ship sugar.

National changed its mind about a consignment point during the equalization process in the case of Toledo, Ohio. We made Toledo a consignment point again and have [fol. 1495] maintained it ever since.

Roughly speaking, National sales territory is from Illinois east and south along the Atlantic Coast. We sell in Wisconsin and to a small degree in Minnesota. Our service to the trade is much better today than it has ever been because the railroads have speeded up their transportation time and the development of the motor truck has cut down transit time. National does not need as many consignment points today as it did 3 or 4 years ago to serve the trade as well. With these increased and better developed transit facilities, they are no longer necessary.

There has been a wider variety of brands offered in the markets where consignment stocks have been eliminated. There are more refiners soliciting and selling sugars in those points than before. The existence of a consigned stock affects National's practice in entering a community where it has not been active before because of the expense incidental to the carrying of that stock.

Storage charges for the first month range from 5¢ to 7¢, the average being 6¢. In the second month the average storage charges are 3¢. The first month is comprised of 3¢ [fol. 1496] for storage and 3¢ for handling. The second month is just the storage of 3¢ and no additional charge for

handling. There is never more than one charge for handling in and out and it applies irrespective of the number of bags.

In 1931 National's turnover of consignment stocks was a trifle above 8. Our minimum expense per bag for every bag delivered from consignment is 10¢.

The storage charge is the largest. If we incurred only the first month's storage charge on all our consigned stock we would have an expense of only 6¢. Last year our turnover was just a trifle above 8. That meant we had to pay a second month's storage on about ⅓ of our stock, which raised the cost to about 7¢. Then we have the interest or carrying charges at 6% and that would run about 2½¢. We also had insurance which would run about 1/10 or 15/100 of 1¢ per bag per month. There are apt to be other slight charges, such as damage, deteriorated stock, stock that has to be sold to move it and taxes.

The customer turns over sugar about once a week. The storage and handling charges would be a great deal less than ours because the customer has his own place of busi-
[fol. 1497] ness and the turnover of sugar is quite rapid. He has handling charges whether he has a consigned stock or whether it is shipped to him by car. If a carload lot comes to his store no charge is paid to anyone. There is the expense of handling but he has that whether he takes sugar from consigned stock or by direct shipment. The customer's carrying charges are very small because he stocks once a week and pays for the sugar every 7 days so there would be no carrying charges. This is so even though he is taking his sugar by direct shipment.

I recall when Grand Rapids was withdrawn as a consignment point. National desired that change because it had a consigned stock in Detroit and in an emergency the trade in Grand Rapids would be served by Detroit over night. We have had no difficulty in giving overnight service from Detroit by fast freight or truck since the withdrawal of Grand Rapids.

I recall the abandonment of Wilmington, North Carolina, as a consignment point. Since that time National has always shipped direct to Wilmington by water even during the period when there was no consignment stock. We shipped to Wilmington by water and rail beyond for customers in the interior as well as Wilmington customers. I

[fol. 1498] did not mean to testify that National kept consignments available in Wilmington for Wilmington customers. I never knew of any question being raised by anyone as to the shipment of our sugar to Wilmington by water.

Wilmington never had a 10¢ service charge for delivery from consignment. I do not know of a competitor of ours having a 10¢ service charge for such deliveries. National has charged for delivery from consignment and one time it had a 5¢ service charge for deliveries ex-consignment in less than carload lots. That was in 1928 and it lasted about 6 months. Since that time we have never had a service charge on deliveries from consignment and I do not know of any of our competitors who ever had a similar service charge.

[fol. 1499] Louis V. Place Recalled.

Direct examination.

By Mr. Higgins:

The large customers of our company, those who buy 10,000 or more bags at a time and 50,000 bags of sugar a year do not buy any differently from our general run of customers. They buy most of their sugar on 30-day contracts. McCahan does not find any difference, in practical experience, between the proportion sold spot and the proportion sold under 30-day contract and the proportion divided between the large customers who buy 10,000 bags at a time and the customers who buy 2,000 bags at a time.

Contract No. SD-1-41, 531-5 is the present form of contract that we use in our business. It is the one marked in the corner "contract in use on March 31, 1931". The other form marked "contract in use on December 31, 1927" was the one in use for a number of years prior to December 31, 1927.

Defendants' Exhibit Y-6 was received in evidence.

In actual practice, under these forms of contracts, the buyer orders out the sugar in any quantity to any destina-
[fol. 1500] tion and at any time he desires, provided it is within the period of delivery agreed on. The provisions regarding delivery are in the first 2 clauses on "Time of Shipment". There has never been before or since 1927 any

attempt on the part of our company to enforce the clause in our contract which says

"Shipping instructions against this contract to be furnished at the time of entering the contract or not later than 10 days before the expiration of the time of shipment specified herein;"

The instructions for the time and place of delivery must be furnished before the expiration of the delivery period agreed upon. The delivery period agreed upon may be different in different cases. When these forms are used as 30-day contracts we write in "30 days" after the words "Time of shipment" on the first page. We use the same form of contract for immediate or spot shipments. In prompt or spot shipments, after the words "Time of shipment", we write either "prompt", "immediate" or "assortment attached". As far as I know the practice of my competitors, both before and after 1927, in the matter of time within which they would receive and honor the orders and directions or specifications of their customers under 30 day contracts of deliveries for shipment has been ex- [fol. 1501] actly the same as ours.

Large buyers who purchase sugar under a contract form filled out for a 30-day period never order it out in a single delivery in the case of a contract which is over a carload. A carload contract will be ordered out in a single delivery but the practice in large contracts is to order out a carload to one destination today and withdraw 100 bags from consignment on another day in irregular amounts throughout the period of the contract. That was true under the contract forms and practice that prevailed prior to the organization of the Institute. It has been the practice as long as I have been in the business, which is 11 years. It is equally true as far as my information goes concerning the practice of my competitors. This practice has been the same between the different refiners throughout the period before and after the Institute, because if one refiner tried to be stricter in the matter of deliveries than another, he would lose the business. In my experience there has been no difference in the practice of the refiners toward large or small buyers, in the matter of calling for deliveries in comparatively small quantities. They all order out the sugar

[fol. 1502] as they need it, in comparatively small amounts, all during the time of the contract.

The unit of delivery is a carload and while large buyers may order out more than one carload to a destination, that does not change the unit of delivery. The number of bags in a carload varies in different territories. In the eastern territory it is 400 bags and in the western 600 bags.

Large buyers usually call for deliveries of less than a carload at a time, very often 2, 3 or 4 bags at a time. Practically every day we have those small delivery orders under 30-day contracts calling for 50,000 bags. The size and number of separate deliveries do not vary as between spot and 30-day contracts. In the case of both spot sales and 30-day contracts, payment is due 7 days after delivery. Spot sales of 2,000 or 3,000 bags to one customer on a given day are not all delivered at the same time and place. They would be delivered in the same way deliveries against 30-day contracts would be made. A carload shipment to one place, delivery from consignment at another place and a less than carload shipment to another place would all be bunched [fol. 1503] together and covered by one contract for the deliveries made on that particular day. When a refiner makes a 30-day contract for a large quantity of sugar to a single buyer the refiner has no information as to when and where he will be called on for delivery of the sugar. It may be called for at any time to any destination and in any quantity. There is in my business, and as far as I have information in the business of my competitors, no customary limitation on the time, place and size of deliveries that may be made to a particular customer under a 30-day contract or spot sale contract, because of a customer's usual practice in that matter.

In my own business, and as far as I have information about it in the business of my competitors, it is the practice of large customers to take deliveries from consignment just like small customers do. It is obviously cheaper for a large customer to take deliveries in comparatively small quantities and also out of consignment stocks instead of direct from the refinery, since he avoids carrying charges until the sugar is actually needed. They withdraw in less than carload quantities at destination at the carload freight rate. If they withdraw from consignment they have [fol. 1504] the benefit of any freight absorption on the part

of the refiner and are spared storage, interest on investment, risk, insurance, etc.

Defendants' Exhibit Z-6 was received in evidence.

Exhibit Z-6 shows the particulars of our invoices under contracts for 25,000 bags dated July 5, 1927. These deliveries are made from stock consigned to the buyer's warehouse to point of destination. We issued these invoices on the buyer's instruction and in most cases the buyer instructed us to invoice carload units. We have no method of knowing how the deliveries were actually taken. I have testified as to the practice under contracts in general. As to this particular contract it is noted that deliveries were taken from the buyer's warehouse. There are other contracts which show 2, 3 and 4-bag deliveries. The column headed "Amount of Bags" indicates the separate invoices and not the separate deliveries on that particular contract.

Large contracts are generally made by chain stores. The first contract is not typical of what is done by chain stores. [fol. 1505] That contract was made in 1927. It appears on the bottom of the second page that delivery was actually from various warehouses. That was not part of the contract. Under this particular contract we have no definite information whether the deliveries from the 's warehouse were withdrawn from that warehouse in carload or less than carload lots.

The information on the second contract, a chain store contract of June 2, 1931, and a third, a chain store contract of July 21, 1931, is based on our own delivery orders. We knew the amounts which were being shipped each day. Our practice with both of these chain stores is to issue one invoice covering all the deliveries made to buyer's trucks at the refinery in any given day. Consequently, throughout the entire list the actual amounts of individual deliveries are smaller than the amounts of the invoices shown. For example, the largest item under date of June 17 with chain store "A" showed a total of 2,890 bags. This consisted or probably at least 28 separate deliveries to trucks at the refinery delivered to all parts of Philadelphia. The first item under June 8, 488 bags to Pennsylvania, was all by the customer's trucks and there is no truck that will hold 488 bags so that probably consisted of 2 or 3 different [fol. 1506] deliveries to trucks at the refinery. In Phila-

delphia all deliveries are by truck. The majority of them carry 100 and 150 bags. Our trucks as a rule hold 100 bags. In 1931 we were still operating trucks which hold only 70 bags. As far as deliveries were made in Philadelphia in our own trucks they would represent units of only 70 bags.

I had no source of information as to the units of delivery except the reports of the buyers themselves. In the third of these contracts, under date of July 21, 1931, which refers to chain store "B", the same testimony is true as to deliveries in Philadelphia which showed 1616 bags and another of 2305 bags on another day in one amount. These amounts are grouped invoices for the total deliveries for that day to a customer and each of those items cover several deliveries by the refiners' trucks. In the case of the largest item, 3,746, there were probably about 30 truckloads covering that entry. The starred ones covering deliveries in the West, are all deliveries from consignment. They represent the total of the sugar invoices from consignment on that day to the customer. The 237 bags delivered in Richmond, Virginia, the 597 delivered in Pittsburgh, the 499 bags [fol. 1507] delivered in Pittsburgh and the 581 bags in Pittsburgh were deliveries by truck from the warehouse to the customer so the individual deliveries would be greater in number than shown here. Each of the cities and towns in Illinois was a consignment point. For example, 286 bags were delivered on August 27 at Peru, Illinois, by truck. It is similar in the case of the other items. Ordinarily, whenever we deliver by truck in the same town, it is from the consignment point in that town, so the unit of delivery from the consignment point would be a truckload or less.

The last one, manufacturer "B" had factories in all those different places and took all carload deliveries by direct shipment from the refinery to the various plants.

It was disadvantageous to manufacturer "B", 1931, and for buyers of large quantities to take out sugar in a single delivery because the buyer did not have the necessary storage space. Furthermore, they wanted delivery made to the point at which they were going to use the sugar. In that way they obtained the advantage of the freight absorption [fol. 1508] which the refiner makes at the ultimate destination. Also if they were going to take delivery in a large amount, which they were not going to use immediately,

they would have the carrying charges on the sugar until the time they moved it to the ultimate destination and used it. These large contracts are usually made by chain stores who have their stores scattered throughout the country or large manufacturers having more than one plant and they wanted the sugar shipped to the places where they are going to use it.

There is very little difference in the regularity with which large buyers take up deliveries as compared with other customers.

Defendants' Exhibit A-7 was received in evidence.

In Exhibit A-7 figures for the quantity refer to 100-pound bags and do not have any reference to the number of deliveries. You can compare the evenness or unevenness of deliveries to our 12 largest customers and the evenness or unevenness in the months of the year by subtracting the column headed "1927" from the column headed "all customers". The same procedure is used for the 1930 [fol. 1509] columns.

Exhibit B-7 was prepared by the Institute from the figures contained in Exhibit A-7. They represent the percentage of deliveries for the 12 largest customers in the broken line and the total of all other customers in the solid line. It is the percentage which the deliveries on that particular month bears to the total deliveries in each case.

Defendants' Exhibit B-7 was received in evidence.

While I have not actually made any experiments to see if the amounts of peaks and valleys of demands and deliveries vary as between any group of the largest customers, my knowledge of the way that the deliveries run leads me to believe that while the same peaks which were obtained by 12 customers might not have been obtained with 24 in exactly the same amount, yet the same peaks and valleys would be obtained in general and the same irregularity would be apparent in any chart prepared. That is, large customers as a group, whatever number I include in the group, do not, as between the different months of the year, take their deliveries in any different relative quantities than small customers.

[fol. 1510] Before the formation of the Institute, there was no quantity discount as far as my knowledge in sugar

trade goes. It was necessary for me to know what my competitors' practice was because we met their competition every day.

I have never heard of and McCahan has never used any system of quantity discounts graduated according to the amount of purchases. All discounts represented a private deal between individual customers and the individual refiner, the refiner meeting what the customer represented to him what was necessary in order to meet the concession which the customer claimed or said he could obtain from another refiner. We had no practical means of checking the truth or falsity of these claims. We had to take the customer's claim, or otherwise, if he were actually offered concessions by the other refiners, we would lose the business. If the concession had not been made by the other refiner, the buyer, in order to save his face, would have to place his business elsewhere.

In dealing with these customers we did not graduate these discounts either by the quantity of sugar purchased at the particular sale or the total quantity bought during the year. It was entirely a question of what we thought we had to give the buyer to get that particular contract [fol. 1511] through, in meeting the competition of other refiners. It very often happened that the same or a larger discount was given to a smaller customer than a larger one. As a class, the larger buyers naturally had a better bargaining power and no doubt, as a class, obtained large discounts but at any one particular time the smaller buyer might obtain a larger discount than the larger buyer. McCahan gave concessions of 5¢ or 10¢ a bag, either in the form of a contract rebate or concession or in the form of some other allowance under the name of "storage" or "brokerage" or something else, to customers who bought from us during the year a total of only 1 or 2 carloads of sugar. Some of our large customers, purchasers of 25,000 and 50,000 bags or more received a concession of only 5¢ or 10¢ a bag.

There is no saving to the refinery in the selling of a large quantity of refined sugar on a single contract to a single purchaser as compared with the selling of the same quantity on a number of contracts to smaller purchasers. In all essential particulars the sale of a larger quantity of sugar on one contract is no different from the sale of

an equivalent amount of sugar on a number of small contracts. It costs just as much to sell and deliver 100 car- [fol. 1512] loads of sugar to any buyer as one carload to each of 100 buyers.

We have no quantity discounts in the purchase of raw sugar. It costs just as much proportionately to buy a part cargo of 1,000 bags of raw sugar as a full cargo of 30,000 bags if the market has not varied. Raw sugar costs constitute about 80% of the total cost to the refiner at the present time. From the other 20% there come the manufacturing costs, storage and carrying costs, handling and delivery costs, accounting costs and whatever margin of return on investment a refiner may get. If a large order were placed at a time when raw sugar was depressed, theoretically a refiner might make a saving, but in actual practice the order for refined is not placed that way. Movements in refined always come at the time when the margin between raw and refined is the closest. The refined more generally follows the raw market down, so that the buyer will place the refined order only after the decline in the raw has been reflected in a decline in refined. Furthermore, if raws was a good purchase at that price, the refiner would probably have bought already, unless he was overstocked. Furthermore, under the practice by which deliv- [fol. 1513] eries are made against refined contracts, deliveries have to start immediately if the buyer requests it, in which case the deliveries are made out of the raw sugar bought at a prior period so that in actual practice a tender of a large order would not enable the refiner to take advantage of any special temporary condition in the raw market, even though that large order covered 6 months.

The sale of a large quantity of sugar on a single contract does not involve any saving to the refiner. The large contract is no different than a large number of small contracts in the equivalent amount. In the sugar business where the product is not manufactured on order, there is no reason for expecting a saving in the matter of routing an order through the factory in the way that other industries make savings on quantity orders in that respect. There is no need in the sugar business for adjusting machinery, dies and various other parts of machinery which are needed in the production of an order. There is no need for quantity discount in the sugar industry on ac-

count of possible changes in fashion such as exist in other industries. There is no justification for quantity discount on the basis of the cost of transportation of raw material [fol. 1514] such as may exist in other industries where raw material is purchased in relatively small quantities and where, in order to effect economical transportation, it is necessary to buy larger quantities. There may be other reasons for quantity discounts in other lines which do not exist in the sugar industry. If all of our production or any substantial proportion were on orders spread evenly during the year, it is evident that the manufacturing costs would be lower, but that would not be due to the size of the order but to the distribution of the order. In the matter of distribution throughout the year on large orders that would enable us to make a saving as compared with the distribution of the small orders, in my judgment it would be impossible to have any substantial proportion of our production based on these evenly distributed large orders. The buyers of refined sugar have a fluctuating demand. As a matter of fact the demand of an important branch of sugar buyers, the candy manufacturers, takes place at one particular time of the year so it would be impossible for the refiners to obtain this even distribution of orders even if the buyers were interested in it, and I do not believe they would be interested because of speculative [fol. 1515] possibilities. The speculative possibilities consist of buying a larger quantity when the market looks favorable than when it looks unfavorable. If we have a number of contracts calling for even number of deliveries throughout the year, some of them being large and some small, the saving per bag on the production and sale of sugar under the large contracts would be exactly the same as the production and sale under small contracts. The saving would be due to the total. If a certain large order came in at the time of slack business, it would not effect any saving for the refiner as compared with an equivalent quantity of small orders coming in at the same time. The receipt of a volume of orders during the slack time would bring about a saving but it would be no different on a large order than the equivalent amount of small orders.

With the exception of labor, most of the costs of manufacturing are in direct proportion to the number of pounds that go through the plant. We can lay off common laborers

but we cannot lay off experienced laborers and expect to get them back again. For that reason the labor cost in a refinery running at 50% capacity is not very much smaller [fol. 1516] in dollars and cents than a refinery running at a higher percentage. The labor charge at the present time is 2% of the price realized by the refiner so that the refiner's saving would be relatively small.

I have not made a study of what the saving in manufacturing costs might be. To compare costs, for example, we have to run at different capacities at different times of the year in all years, but there are many variables other than the percentage at which we are running. The coal cost varies from year to year. In a particular month we may be running a higher percentage of small packages and our container cost would vary. The cost of making containers is approximately the same as the labor cost.

These variables make it very difficult to obtain any exact comparison as to the effect of the percentage of capacity on the percentage of profit. I would like to emphasize that the last 100,000-bag order that you get is no more responsible for the reduction than the first 100,000-bag order.

In other industries, where there is a trademarked product which a manufacturer can push and give a discount [fol. 1517] to a large buyer, securing that large buyer's help in promoting the sale of this article and acquainting more consumers with the existence of the article so that they will come back and demand that trademarked specialty by name, a direct saving can be made in the manufacturing costs by giving these discounts and increasing the total amount. This is due to the fact that on these specialties the demand is elastic, but in the case of sugar the demand is inelastic. The distribution may vary from year to year but actual consumption does not vary so that discounts to large buyers would not result in increasing the total purchases of the sugar. Even if it did, we have no assurance the demand would be for our particular brand of sugar. Purchasers might come back and ask for sugar but not for McCahan's.

Even though the total demand of the total country for sugar is highly inelastic, we could undoubtedly increase our own volume of production, thereby making a large saving and decreasing our costs through the offering of a quantity discount, on the assumption that we would offer a quantity discount and no one else would, but from my practical experience with the sugar business I know such a situation

[fol. 1518] is not possible. In the same way that the refiner has to meet the lowest price named by a competitor, he has to meet favorable terms offered by a competitor, including the quantity discount, if any. Such a saving could be effected only upon the assumption that other refiners would not offer an equivalent quantity discount, but the assumption is a poor one. I have never known of such a practical situation in the sugar trade.

Even if the delivery of a large contract were effected in 1 unit, if that delivery were asked for immediately upon the purchase, it would involve delivering sugars that had already been manufactured or were in storage, because this large quantity, if it were a true quantity purchase, could not be delivered from current production. Even if the delivery were asked for at the expiration of the contract in 1 unit, or at any intermediate period, it would necessitate the refiner's accumulating the amount of sugar to make that quantity delivery so that in any case carrying and storage charges would be incurred. If it is less than 1 delivery, then it is no different from the equivalent amount of small contracts. The situation of the refiner is the matter of storage and carrying costs on a delivery involving a large quan-
[fol. 1519] tity order in 1 delivery as compared with a series of deliveries to small purchasers buying an equivalent volume is the same.

If the sugar were shipped right out of the packing floor, there would be a saving effected, but it would be the same of deliveries on small contracts as against deliveries on large contracts. There is only one way in which the refiner might make a saving in storage and carrying charges through the manufacture and delivery of a single order as compared with the manufacture and delivery of an equivalent volume of small orders and that would be for the deliveries to be made at the seller's option. If we could deliver at any time that we had the production, so that the sugar could move out from the packing floor right into the cars, then we could save storage and carrying charges, but of course that never happens.

There is no difference in the delivery and handling costs on deliveries against large contracts as against deliveries on an equivalent amount of small contracts. It costs just as much to deliver 100 cars to 1 buyer as 10 cars to 10 buyers. If a purchaser of a large quantity of sugar took delivery of the entire quantity at a single time and place, there

[fol. 1520] would not be any saving in the handling and delivery charges as compared to the delivery of an equivalent volume of small orders by the carload. The delivery and handling expense would be exactly the same for both.

The statement is often made that it is more economical for the refiner to handle delivery in carload shipments than in l.c.l. shipments. However, when you go into that question you are referring particularly to contract shipments from the refinery as against deliveries from consignment. Where you are shipping from a packing floor in the refinery, your costs are less than where you are paying storage and carrying charges in consignment. L.c.l. deliveries are made both from the refinery and from consignment. When deliveries are made from consignment the delivery cost is no greater by l.c.l. than it is in carload quantities. In either event we have assumed the storage and carrying charges. The warehouse, in actual practice, makes the same charge of 6¢ for the first month regardless of whether we are making up that carload in 1 shipment or [fol. 1521] whether it is going to be 400 separate shipments because usually the l.c.l. deliveries are to a truck and are delivered to a platform of the warehouse. If there were large volumes of l.c.l. deliveries by railroad and the warehouse attends to making out the bill of lading and all that sort of thing in connection with railroad shipments, and actually takes the sugar to the freight station and makes the delivery to the railroad, it makes a charge. In such cases there would be a difference, but in actual practice the l.c.l. deliveries from the warehouse are handled by buyers' trucks and in that case the charge by the warehouse is no different. As far as delivery of and handling sugar are concerned, the 2 and 5-bag deliveries from consignment do not cost us any more.

Unless a refinery has a freight terminal next to it or a volume of l.c.l. shipments that are sufficient to make up an aggregate of carloads which can be turned over to the railroad at the refinery's switch, then the refiner has to truck the sugar to the freight station and in that case has the extra expense of trucking, the same as he would on [fol. 1522] any other local deliveries. However, the refiners who have that extra expense cannot and do not make such extra charge because they have to meet the terms of the refiners who do not have it. Apart from this trucking charge

there is no saving in the handling and delivery costs from carload as distinguished from less than carload shipments. It costs us more to deliver a bargeload shipment of sugar than a carload shipment. Due to the fact that our packing floor is located at quite some distance from our wharf, we have to absorb the costs of taking it in the case of barge shipments, whereas in the case of carloads they are loaded directly to the cars. I do not know of any refinery where the delivery cost to the barge can possibly be less than delivery cost to cars.

Bookkeeping charges are not based on the size of the contract but on the size of the number of deliveries because the writeup of the delivery orders and the various kinds of paper work that would have to be done are based on the number of deliveries, not on the size of the contract. The contract itself is just 1 item and is handled only once a month or whenever there is a buying movement, whereas the bookkeeping and clerical work on deliveries is going [fol. 1523] on every day. In the case of the single contract, there would be only 1 contract to be booked, whereas on 10 or 12 small contracts covering the equivalent volume, there would be 10 or 20 items to be booked so that the bookkeeping and clerical work is larger on the small contracts than on the larger ones. That is not a substantial portion of the bookkeeping and clerical work in connection with the orders. Our total is so small that if it were reflected on a bag basis, it would be a minute fraction of a cent per bag.

The main item in the selling cost is brokerage. It is the same per bag in the case of a large contract as in an equivalent volume of small contracts. The other element in selling cost would be the sales of the refiner himself and there I believe there would not be very much difference in the selling cost per bag in selling a large or a small buyer. As a matter of fact, the large buyer is more susceptible to attack on the part of other refiners. The selling cost in the case of a large buyer is at least as much per bag as the selling cost of the equivalent amount to small buyers.

A refiner who does any substantial portion of his busi- [fol. 1524] ness with the large buyer is more susceptible to attack than the refiner having an equal amount going to small buyers.

Outside of the Code, the Interpretations, the minutes and written actions of the Institute, there has never been, ac-

cording to my knowledge or information, any action of the Institute which condemns or recommends the offer by any refiner of a discount or lower price on contracts for the delivery of fixed quantities of sugar at regular intervals or at seller's option as contrasted with the usual type of contract for delivery at buyer's option, outside of the fact that they should be openly announced. McCahan has never had any demand or request in its business for the delivery of fixed quantities of sugar at regular intervals or delivery at seller's option. I do not know of any such demands in the industry. To my knowledge or information there has never been any action by 2 or more refiners, in agreement or by consort or by any other way, which condemned the offer by any refiner of a discount or lower price on contracts for the delivery of fixed quantities of sugar at regular intervals or at seller's option, as contrasted with the usual type of contracts for delivery at buyer's option.

[fol. 1525] As far as I know there has not been any action or recommendation of the Institute for any 2 or more refiners condemning the offer of a discount by a refiner at a time of slack production in order to obtain an additional volume of business, provided it was openly announced.

Cross-examination.

By Mr. Fly:

As a class, large buyers do not take larger deliveries than the small ones. There may be individual buyers among the larger ones who take carload delivery but there are small buyers who take nothing below carload deliveries. The average of these large purchasers' deliveries out of consignment is no different as a class than our other customers. As far as delivery and storage items are concerned, most of these deliveries, which are by customers' trucks, make no difference to us since the customer pays the cost of trucking and our storage and handling charges are the same. There is a slight difference in the paper work. It depends entirely on the large purchaser whether sugar is drawn more frequently. As a class, there is no difference between them and the small ones. The large buyers take [fol. 1526] no more frequent deliveries than an equivalent amount of small buyers who buy the same aggregate amount.

Petitioner's Exhibit 491 was received in evidence.

In the letter from Albergotti Bros. & Co., Roanoke, Virginia, dated January 2, 1928, together with the reply under date of January 12, 1928 written by Stanton, the broker expresses his opinion that the concession which Piggly Wiggly got was based on the amount purchased. I heard that statement made time and time again, that so and so was getting a concession based on the amount he bought, but that does not mean anything. We are not going to argue with anybody who makes a statement we do not agree with.

Petitioner's Exhibit 492 was received in evidence.

[fol. 1527] Chain store B is among the very largest chain store companies of the country. After the Institute was formed McCahan gave one concession and one concession only to chain store B which was not publicly announced, not covered on the face of the contract, and concerning which the Institute was not notified.

In the summer of 1930 we arrived at the conviction that Spreckels had given a concession to this customer. We deliberated for a long time in our organization as to what we would have to do about it, and we finally arrived at the conclusion that due to the fact that this customer had remained loyal and had taken sugars out during this period when Spreckels was giving a concession, we did not want this customer to suffer by having taken our sugars as against having taken Spreckels sugar.

We went to the customer and after deliberating over the matter for a number of months finally decided in the latter part of October, 1930, that if we gave an equal concession to this customer on contracts entered in April, May and June of that year that we would compensate that customer, as nearly as we could determine, for having taken our sugars instead of having taken the other refiners'.

In the early part of November, 1930, we issued a company check for $56,000 to the order of this customer which we delivered to the customer by hand. The matter had been [fol. 1528] discussed before we delivered the check. McCahan was trying to find out what it was that was being done. We could not find out definitely and were trying to pry it out of the customer.

If Spreckels had still been operating we might have made an open announcement declining the open price 10 points.

It would have applied to everybody and other refiners would have followed except that Spreckels would not have participated in that decline. It would have affected our whole trade throughout the country and would have been very expensive. For that reason we did not do it. If Spreckels had still been in operation, that would have forced him to give the same concession, which he gave to this customer, to all of his customers. Our decision would have been to make an open announcement and make Spreckels take the loss. We would have taken a loss and everybody else also but our object in considering this matter thoroughly was to make it apparent to the other refiners, including Spreckels and the trade in general, that we did not believe that was the correct method of doing business.

On June 19, 1930, there was a meeting of the Institute at which accusations of irregularities were made without mentioning particular names. Everybody denied that these secret concessions had been made with the exception of Spreckels, but we felt that after that meeting Spreckels would change their method. We had no assurance that Spreckels did not in fact give rebates after June.

In March, 1930, chain store B materially decreased the consumption of American Domino and increased the consumption of McCahan. This was the purpose of a trip made by Stanton of McCahan to Chicago with the sugar buyers of that company. On that trip Stanton did not hold out any inducements to the buyer.

We never departed from our regular price basis as regards that customer. We did not commit ourselves in advance to make a payment and therefore did not serve notice we would withdraw it. That payment was what it was and that was the end of it. I see nothing contradictory to what I have said in the memorandum on this topic given Fly by a chain store concern which reads:

"(On McCahan): It was sometime in the early part of March when Mr. Stanton of McCahan was in my office and [fol. 1529] we were discussing the business, and he said that he was very anxious to maintain what they had and increase their business, if possible. I do not recall exactly what he said. These are just my own words. As I recall, I told him that on the present basis I thought that was practically impossible and if I recall he said that they had an intimation or idea that there were undoubtedly conces-

sions going on. I told him of course that we could not expect to buy sugar from them at a disadvantage to ourselves. He agreed that was so and he thought his company would see the light in that respect and if I would bear with him until they discussed it he was sure that they would promise to take care of us on some legitimate basis. That happened in March. They gave us a good business, Spreckels also. Around the same time that Spreckels discontinued the arrangement that they had offered us Mr. Stanton of McCahan told me that in view of the Institute meeting and all that he did not want me to be under any misunderstanding. He practically assured me that he would meet it. When the contract we were working on was finished, no matter what the competition was, it would have to go back to the regular basis."

We wanted to meet the competition in some way and I have no doubt that Stanton may have told the buyer as early as March that we were discussing the situation and trying to arrive at some decision.

I was not informed in any way at all about any intimations having been given to the buyer along about the summer but this memorandum indicates that these conversations, that Stanton and I had had, had been reflected in conversations between Stanton and the buyer.

The Court: I don't care anything about that. These memoranda speak for themselves as memoranda of what the buyer told Fly.

The Witness: I had no information, belief or anything else. I don't doubt that Stanton may have had that conversation with the buyer. I did not at the time and do not know now that he had. Stanton did not tell me that he had any such conversation with the buyers.

Stanton and I had been discussing these rumors of Spreckels concessions and what we would do to meet them [fol. 1530] and were considering that very problem in March, 1930. After the Institute meeting of June, 1930, Stanton told me that he had told the buyer that that sort of thing that he was considering would not be applicable to any contract after June but would be confined to this other time.

The check was written in the early part of November and covered the contracts up to the dates of the Institute meeting in June.

I do not see any reference to this matter in the minute book of the Directors' meeting in June.

I issued the check with instructions that it should cover the deliveries against contract in April, May and June, 10¢ a bag and that the check be made payable directly to the customer. We charged this item in our books against sales. I instructed that it be deducted from our receipts on the sale of sugars. It would appear on the books as a reduction in our receipts against sales of sugar like returned goods.

I cannot explain the fact that in Exhibit A-7 our deliveries to our largest customers decreased from 116,000 and 166,000, respectively, in February and March 1927 to 111,000 in April while in 1930 the shipments in February and March were 160,000 and 163,000, respectively, and in April they jumped to 232,000. It was in the early part of 1930 that we took all this additional territory for customer B. The increased business from this new territory that we took on was the factor which accounts for the fact that sales in 1930 were very substantially higher than the sales of 1927 which had been down through October of that year.

I cannot explain the reason for the fact that while in 1927 there is an increase from 138,000 to 160,000 to the 12 largest customers, in 1930 between October and November there was a decrease from 304,000 to 207,000. I think the decrease in 1930 was nothing but a seasonable decrease. I believe that the substantial increase in 1927 was a freak. In 1927 not only the 12 largest customers increased but the total of all the customers increased.

[fol. 1531] We have a greater number of l. c. l. deliveries than deliveries in carload lots. There is some advantage to the large customer in taking deliveries in small quantities of a carload lot or less. We make very few less than carload shipments by railroad from the refinery. In some cases we have announced freight applications to nearby towns, based on truckload quantities, which applications are below carload quantities to that particular point. Our application on l.c.l. shipments is greater than our application on the same quantities in carload lots except at those points where we quote a rate applicable on carload or less than carload lots. Our application on less than carload lots is the actual railroad rate, which is higher than the railroad rate on carload and more than our application on carload

lots. The railroad rate on less than carload is more than the rate on carload and is more than our application on carload.

Prior to the Institute, in fixing our price, we did not meet all the claims of our customers. We knew what the current price for sugar was and in that particular point met competition all the time. Any discount below our general selling price was based on the claim of our customers as to what they would be able to get from somebody else. We tried to determine whether the claims were reasonable or or not. We did not want to give a purchaser more than the other refiners did nor more than was necessary to retain the business. If he threatened to take his business away [fol. 1532] from us we tried to question him to find out what the concessions were. After the customer left we would consider whether, under the market conditions, it was probable that other refiners were willing to sell at the price claimed. If so, we had to decide whether to meet the concession or pass up the business. If we thought we could not pass up the business we would meet it. We never offered a concession until we definitely knew we had to give it in order to hold the business against competition.

Everything else being equal, we prefer to have 100 customers using 100 units than 1 customer using 100 units. We make the same money out of each. If a large order was shipped out in 1 unit there was only the question of bookkeeping charges which are a minute fraction of a cent per bag but by being shipped out the way they are, there is no difference at all.

When there is plenty of raw sugar available it is possible that small purchases would be made on a better basis than large purchases. The minute a refiner shows his hand on a large unit the seller withdraws and tries to get a higher price. I never heard of any demand for contracts providing for equal deliveries throughout the year. Revere [fol. 1533] offered such a contract in our territory and there were practically no buyers who were interested. In my opinion buyers were not, are not and would not be interested in such a contract. Revere's contract provided for maximum and minimum deliveries. There were no contracts to supply the requirements of particular plants of the purchasers. They gave the buyer an option of a maximum or a minimum requirement at stated intervals during the year.

I am familiar with the requirements of large manufacturers having a fairly constant demand for sugar. I do not think there are any manufacturers who have a fairly constant demand in the sense to be able to take deliveries from refiners in equal quantities throughout the year. The baking companies, such as National Biscuit, probably came nearer to it than any other manufacturers. No contract for fixed quantities per month over a substantial length of time was ever offered to us. We tackled at one time or another every buyer who was in our selling territory. Any increase in production brings down our overhead but if we were operating at 50% capacity and would get a contract to increase operations 25% further the unit per bag cost is no greater on the remaining 25% than on the first 25%. [fol. 1534] Such contracts as that with chain store "B" are not arranged by the representatives of the refiner with the buyers direct. We always receive the order from the broker. We pay brokerage on every bag of sugar which leaves our refinery. I do not know of any case where a contract was entered into without the intervention of a broker. I do not know of any case where a broker who received the brokerage has not performed some service for the buyer and for ourselves. We make it a policy of paying the full amount of brokerage to some broker in every transaction, regardless of the amount of effort he expends.

Petitioner's Exhibit 493 was received in evidence.

McCahan operated at 60% to 85% of capacity during 1930. We operated 6 days a week and closed down entirely on Sundays. Certain departments are in operation during the day shift. Other departments are in operation both day and night. I cannot give you the details of our production operations. I am not in charge of production. I do not know how many boilers we have, what steam pressure we carry, nor what fuel we consume. I cannot list the machinery in the refinery. The percentage of capacity at which we are operating from 1925 to 1930 varied at different times of the year, between 50% and 95%. In 1930 we were refining somewhere between 10% and 25% more than in 1925. I think there was a gradual upward [fol. 1535] trend with fluctuations from the 1925 level to 1930, with the exception of 1928. Our business declined in 1928 in the Midwest because we were not meeting the guaranty.

There have been some fluctuations in compensation and in personnel during the period from 1925 to 1930 but it has no relation to the amount of sugar refined.

Repairs fluctuated with production. They would fluctuate from 60% to 80% on a similar rise in the refining operations although it might not be reflected in the accounts of that particular year.

The biggest year of operation McCahan ever had was 1930, or possibly 1931. There was a slight increase in 1927 as compared to 1925 and 1926. In respect to repairs in 1927 being $71,832 as compared to $95,070 in 1925 and $96,364 in 1926, I might point out that when this company was started in 1921 the plant was old and run down and the necessity for repairs was very much greater in the beginning. We have been gradually getting the plant in good condition and the necessity for repairs has undoubtedly gone down. Taxes on our real estate and buildings are part of our overhead. Our interest charges would naturally vary with production. If we have a large amount of raw and refined sugar on hand our interest charges are [fol. 1536] larger.

Dividends paid to the owner bear no relation to capacity. Our advertising is normal so it would not be a factor. We do not pay any rental on the refinery. We occupy the same property, whether we are operating at 50% or 90% of capacity. Common labor fluctuates in proportion to our operations but skilled labor does not fluctuate. The largest item of the entire 20%, outside of the 80% for raw sugar, is the 7-pound loss in refining. Labor and containers are the next 2 largest items. The 80% is 80% of the selling price of the refined, not 80% of the cost of the raw. We do not include the 7% loss on the cost of the material. We try to increase common labor in direct proportion to the increase of refining but we have not succeeded in doing it. We have a number of common laborers as well as skilled ones who have to stay on the job.

There is some saving in purchasing cartons in large quantities. The same applies to bags. The labor cost of 4% includes the skilled labor and all the refinery labor but not the administrative labor at the office. Included in the refinery wages are the salaries of the officers who are attached [fol. 1537] to the refinery. The 4% item is 4% of the total, not of the 20%. Exclusive of the officers and the white

collar clerks, at least half of our labor cost is for skilled labor.

Fuel cost is the third largest item after loss in refining. The proportion to the amount refined cannot be greatly varied. Depending upon the market for bags and containers, the largest item would be either labor or containers and the third item is fuel. Trucking is relatively important. We do not own our trucks. We contract for them on a per bag basis. Trucking is limited to points near Philadelphia. Of the business which is trucked, at least 50% of it is trucked at our cost; 10% of the total is trucked. We truck 5% at our own expense. If we increase our refining operations on account of contracts covering our market areas in general, the increase in trucking would not be significant if it covered our territory in general, because there would be the same percentage in the trucking business as there would be in the other business. The increase would be normally the 5% which we trucked at our own expense, but not the other 95%.

Repairs are another important item. On our bookkeeping setup we have an item of general expense which is included among the refinery expenses. We put in it purchases of material and things of that kind. It includes the replacement of parts of machinery and general expense of operating the refinery office.

[fol. 1538] At the time of the June meeting I did not have the slightest idea as to what we were going to do.

The trip in March had nothing to do with the matter of concessions. It was solely to complete the arrangements for the transfer of the business from one broker to another which had been determined at least a month prior.

The general tenor of the remarks was that somebody else was making the rebates and I noticed that Spreckels was conspicuous by his absence of any remarks and that led me to infer that our suspicions were correct. At the June meeting of the Institute we had not found any way or in what form we were going to equalize matters with Spreckels' discount which we believed he had been giving.

By giving the concession to chain store B I not only violated the inference that we were not in the future going to enter into any such arrangement but I violated the Code of Ethics which I considered very important.

Stanton tells me that he believes that during conversations with the buyer in May, when he was trying to find out whether they had been given concessions, he said to the buyer:

"I am going to recommend to our company that we do something about this in the form of an open announcement or something else."

The Court: Then the $56,000 check came neither as a complete surprise on the one hand, as far as the buyer was [fol. 1539] concerned, nor was it on the other hand, as I understand the situation now, a mere reward of merit for sticking to you under these trying circumstances of having to pay you approximately 10¢ more because while the buyer was under this trying circumstance he had every reason to believe that he would get a check; and I think it would not be a very broad assumption to assume that he had every reason to believe that he would get a check even under his Spreckels arrangement.

I don't think this is a fair interpretation. It is our impression that no such intimation was given until the matter had become very acute in the end of May or the beginning of June when we finally arrived at a firm conviction that Spreckels must have been doing something. Furthermore, I think that our discussion had more to do with the matter of open announcement, giving it to everybody rather than equalizing to that particular customer alone. The open announcement alternative was considered to the very day when the instructions were issued to write out the check. The open announcement would have been retroactive to April, May and June. It would not have been retroactive for business between June and November 1. My impression is that Spreckels closed in July or August, 1930. We thought it was a temporary shut-down and it was not until the second half of October that we learned it was permanent. With the exception of the retroactive decline of all refineries on February 10, 1930, for 1 month running from the date of the announcement, we never heard of a retroactive announcement substantially similar to the one we were considering. I cannot point to any other instance either before or since the Institute which I think is at all

comparable to the announcement which we were considering in November 1930.

This check was delivered by Stanton in person to the buyer in New York. The book entry was merely a charge against sales and the recollection of the voucher clerk was that the entry said nothing but "November account" or some other bookkeeping entry of that kind. As far as the ledger is concerned all it does is refer to the voucher number. The recollection of the voucher clerk is that there was no explanation on the voucher except a bookkeeping item such as "November account" or something of that kind. We made no attempt to conceal the information about the check. On the other hand, we made no attempt to explain it. It was done in the regular course of business and handled like any other check.

[fol. 1540] Our capacity was the same during the years 1925 to 1930. The statistics show that the consumption in July is about twice as much as the consumption in December. We did not refine in December, when the demand is low, and stock up for 6 months ahead, when the demand is high. We would be afraid that the sugar would deteriorate. While the maximum capacity of the year round would theoretically be the July capacity, actually we did not manufacture all the year round. We try to flatten the curve out as much as we can by storing in the winter, but there are limits to that. The 450,000,000-pound capacity is the total capacity for 300 days in the year at the theoretical maximum. The capacity stepped from 450,000,000 in 1925 to 525,000,000 in 1926 and 600,000,000 thereafter. The first figure given was for 90% capacity and the 1930 figure was 80½%.

[fol. 1541] Insurance of all kinds in 1927 was $46,503, in 1928 $61,187, in 1929 $54,932 and in 1930 $59,006.

The figures for the salaries and wages of the office force, salesmen, etc. are: 1927, $45,201; 1928, $44,566; 1929, $32,029; 1930, $42,785. There was a reduction in the office salaries in one year because there was a transfer from office salaries to officers' salaries. That explains one of the fluctuations. Officers' salaries were as follows: 1927, $68,100; 1928, $72,571; 1929, $53,110; 1930, $110,900.

The explanation of the low figures for labor and officers' salaries in 1929 and the high figure for 1930 is that the latters, also includes bonuses declared for 1929 and paid in 1930.

The reason that storage expenses are less in 1929 than in 1928, even though there was a greater percentage of operation in 1929 than in 1928, was not due to the elimination of consignment points. The explanation for that reduction is probably the fact that though our operations were lower in 1928 than in 1929 our sales were still lower in 1928 than in 1929 so that our accumulation of stock in 1928 was greater. Therefore our storage charges [fol. 1542] were greater. The jump in storage charges from $31,894 to $100,203 in 1930 was due to the fact that our percentage of deliveries from consignments greatly increased. It has been a steadily increasing item over a period of years. Every year we are delivering a greater percentage of deliveries from consignment than in previous years. Over a period of years there has been an increase in our deliveries from consignment from less than 10% up to 30% of our total deliveries.

[fol. 1543] Redirect examination.

By Mr. Higgins:

The purpose of the train ride to Chicago in the spring of 1930 was to complete details of the transfer of chain store B's business from one broker to another. For 3 or 4 weeks prior to this trip the customer had expressed to us dissatisfaction with his connection at that time and we had had a definite assurance that the business would be transferred from one broker to another. At the time we had the assurance, or at the time the train ride was taken, there had not been any discussion in our organization of the possibility of giving to this customer any rebate or concession. One of the reasons why we took this action eventually was because this additional business had been turned over to us at that time and kept with us in spite of the fact that the customer could have bought more cheaply from Spreckels.

The customer chose the broker with whom he dealt and we paid the broker the commission. The customer had not been giving us business heretofore in the Chicago territory.

The customer, not the broker, has the say where the business should go, but the broker naturally influences him. What brought about this change in the mind of the customer was his dissatisfaction with the broker. The customer chose our broker and we naturally received the benefit.

[fol. 1544] W. D. FLINTOM was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Browning:

I am secretary, treasurer and general manager of Thomas & Howard Company, a wholesale grocery business in Charlotte, North Carolina. Our corporation owns and operates 2 stores, one at Charlotte and one at Salisbury, North Carolina, each one as a wholesale grocery unit. We have direct relationship with other wholesale grocers in that district. The C. C. Thomas family owns interest in 12 wholesale grocery houses in North and South Carolina, including the Charlotte and Salisbury units which are operated as a single corporation. Each organization has a local manager who occupies the same position that I do at Charlotte. The general managers have an interest in the business which they operate and some have an interest in 2 or 3 of the other stores.

There is group buying for the 12 stores. We do some cooperative buying of some items when we want to split cars but each store does its own sugar buying separately. I buy the sugars for the Charlotte store. The executives of all the stores meet about every 6 weeks. We discuss matters pertaining to general business policy, including the buying [fol. 1545] and selling of sugar. I visit the other stores from time to time, am familiar with their plant, equipment and operations and receive a weekly and monthly sales report from each store. The Charlotte store handles on the average a little more than 400 bags a week. The Salisbury store handles approximately the same amount. Some of the other stores do not handle quite as much. We average about a carload per week per store and do about the average business of a jobber in North and South Carolina.

Savannah carried consigned stocks in Charlotte from time to time from about 1922 to 1926 or 1927 and American, Pennsylvania and Savannah carried stocks practically all the time until late in 1929. National carried a limited stock at times, but not regularly, from 1926 to 1929. About the end of 1929 all consigned stocks were discontinued in Charlotte and were never put back. While they were there we used them for filling ⅕ to 1/6 of our requirements. The

remainder of our sugar was bought direct from the refiners. We took ⅕ or 1/6 because we ran out of sizes between cars. Knowing that we had the consignment available, we were a little negligible about ordering out cars and keeping up our stock.

[fol. 1546] We ordered sugar for shipment from American and National about 4 days in advance and from Savannah about 2 days. We place contracts at times but we also order for immediate shipment. If we have a 30-day contract our withdrawal order is for immediate shipment. We buy from American, National and Savannah and some Snow White sugar from Armstrong. The transit time from Savannah to our plant is about 2 days. American's transit time from Baltimore or New York is 4 days and the same applies to National. In an emergency where we need sugar in a shorter period of time occasionally we withdraw from Norfolk or Charleston and recently we have withdrawn a little from Wilmington, but we tried to avoid this because we prefer to get our sugar in cars direct from the refineries. Aside from these emergency orders, we have taken our sugar entirely by direct shipment from refineries since the withdrawal of consignment points. We have no difficulty at all in filling our emergency requirements since the withdrawal of consignment points. Our sugar shipments have been handled very promptly.

There has been some improvement in the service since 1928 although we have always had prompt shipments on deliveries. The railroad seems to handle them a little more [fol. 1547] promptly and we do not have delays. We have no difficulty in gauging the assortments which we need. We use about the same assortments from week to week. We anticipate our requirements more carefully than we did when we had consigned stocks.

I do not consider consigned stocks of any value to us in the conduct of our business. Our storage expense is very small due to the turnover. We have 1 warehouse where we carry all the sugars and groceries that we handle. The cost per annum on that warehouse, including rent, taxes and repairs, is about $2,700. Approximately 3% of our total warehouse space is devoted to sugar. When there were consigned stocks in Charlotte we had a sugar space in our warehouse. We used approximately the same space because we did not depend upon consignments for our principal supply.

We do not have any carrying charges on sugar after we get it from the refiners and before we deliver it to the retail trade because we have a turnover of about a car a week and the payments have been 7 days from date of arrival. The terms have always been at least as favorable as 7 days after arrival.

[fol. 1548] For the past several months we have been receiving sugar on what is known as the 4-payment plan. Under that plan we receive a car of sugar and payment is due in 7, 14, 21 and 28 days, irrespective of the time when we use the sugar. We sell the sugar and collect for at least part of it before we have to pay for it. We get the use of a little capital sometimes if we collect for it quickly enough. The insurance cost on the commodities in the warehouse in Charlotte is 1.06 per hundred per year or approximately 1/10 of 1¢ a bag.

We deliver in a radius of about 40 miles. Deliveries to customers, general overhead expenses and the carrying of the customers' accounts are our important costs. Delivery costs are not affected in any way by whether or not consigned stocks are carried in Charlotte although if we drew from consignment we would have an additional handling charge. It would be higher on withdrawals from consignment because we send our own truck to the public warehouse, bring the sugar to our warehouse, unload it and then load it back on to our truck with other groceries going to the trade. The greater part of our deliveries go to various small nearby cities and it is necessary to load sugar on the trucks in the order in which it is going to be unloaded. [fol. 1549] That means an additional handling or trucking charge when we draw from consignment.

Carrying retail customers' accounts is a very important item. That is not affected by whether or not refiners carry consignment stocks at Charlotte.

Our general overhead expense consists of officers' salaries, office expense, the paying of bills, insurance and labor. This general overhead expense is not affected by whether or not the refiners carry consigned stocks in Charlotte except that the more we draw upon consigned stocks the more handling we have. Our operating expense on the commodities which we sell generally runs about 7% of our sale price. The conditions which I have described as affecting our expenses are about the same throughout the territory in which all the stores operate.

I travel frequently in parts of North and South Carolina, have talked with the jobbers in those states and have attended the Wholesale Grocers convention for the past 2 or 3 years. I have never heard a complaint from anyone in the trade in North and South Carolina about withdrawal of consigned stocks by the refiners in those states.

[fol. 1550] From the time that we place the order, we get sugar shipments more promptly than most other items. The refiners seem to ship it more quickly. I have had no trouble in buying or getting sugar since the Institute started.

Cross-examination.

By Mr. Rice:

I have discussed shop with other jobbers who handle sugar but I do not recall whether I ever discussed consignment points specifically.

If there were consignments in Charlotte today I would avail myself of most of them in a very limited way and try to use them just as little as possible. Lard is handled in a very similar way to sugar. We now have consignments of lard in Charlotte and we do not draw more than 1/10 or 1/15 of our lard requirements because it is expensive to handle from the warehouse and that would be our policy with regard to sugar.

Our withdrawals from consignment in 1927 were an expensive luxury. There was no saving of money or competitive advantage to us in doing so.

[fol. 1551] We handled about 50% of our sugar in 100-pound bags and approximately the same amount in 25s and 10s. About 3% is handled in 5-pound bags. We handle less than 10% in packages. About 90% of the carload used each week in our Charlotte store is made up of 100s, 25s and 10s. At times there was a convenience in having an assortment available at a consignment warehouse where we might choose 25 or 10-pound lots of small packages. It was, however, an added cost which could have been avoided by our anticipating our requirements. It could have been avoided altogether by carrying a little more sugar.

At times we are still taking emergency withdrawals from Norfolk and at least one other point. On occasions it possibly would have been an advantage to have a consigned

stock to draw upon. However, we have overnight service by truck from Charleston or Wilmington and can place our order in the afternoon oftentimes and have our sugar the next morning.

There is public trucking from Wilmington, which is a consignment point. Withdrawals from consignment at Charlotte would have been a little more convenient but involved an additional expense. Withdrawals from consign-
[fol. 1552] ment at Wilmington or Charleston do not involve an added expense since the sugar is trucked directly to and unloaded at our warehouse, whereas, if we withdraw sugar from a consignment in Charlotte we would have to withdraw it ourselves. The delivered cost at our warehouse from consignment points like Charleston or Wilmington is practically the same as the cost of delivery from consignment in Charlotte. It is less than 2¢ a bag. By knowing approximately what we are going to use, we can anticipate our requirements very easily a week or even a month ahead with reasonable accuracy.

Redirect examination.

By Mr. Browning:

One of the reasons I preferred a direct shipment to a delivery from consignment was the expense of getting the sugar from the consignment warehouse to our place of business. In addition to the actual distance which the truck travels there is the handling expense involved.

There was a freight application announced for Charlotte which applies to sugars bought there. If we withdrew from a consignment warehouse, the basis price and freight charge would be the same as that of a direct shipment from
[fol. 1553] the refinery. The total transportation charge which we pay on emergency deliveries from Norfolk, Charleston or Wilmington is practically the same as on direct shipment from the refinery.

Recross-examination.

By Mr. Rice:

I favored the elimination of consigned stocks at Charlotte. When stocks were consigned there they were carried with a broker who warehoused the sugar and made

sales. Sometimes, the broker being eager for business, would sell some of the larger retailers and we want to eliminate that practice.

Redirect examination.

By Mr. Browning:

I did not urge the abandonment of consigned stocks. There was very little attention paid to the question by jobbers in our territory. The business of some of the retailers is not an important element in our business because there is not a great deal of it done.

Recross-examination.

By Mr. Rice:

I do not recall any jobber without a siding who handles sugar at Charlotte. The practice of other jobbers. prior to [fol. 1554] the elimination of consignment stocks, was pretty much the same as ours.

The times we had occasion to make an emergency withdrawal from points outside of Charlotte since its elimination as a consignment point is rather indefinite, but I would say it was once a month.

[fol. 1555] CHARLES H. WHITE recalled.

Direct examination.

By Mr. Higgins:

Both our large and small purchasers buy the same proportion of sugar on 30-day contracts as they do on spot. Both purchase the greater quantity on 30-day contracts. The contract form marked in the lower righthand corner "Contract in use on December 31, 1927" is the form which was in use by our company at and before that date. The contract form marked "Contract in use on March 31, 1931" is the form in use by our company on that date and since.

Defendants' Exhibit C-7 was received in evidence.

During the past 10 years we have not used a new form of contract that was different from these 2 forms with respect to the time within which delivery might be called for by the buyers. During the last 10 years we have always permitted buyers to call for delivery any time during the period specified in the contract. We have never at any time enforced the following provision of our contract:

"Specifications and Weight

Buyer shall, before the expiration of the first half of de- [fol. 1556] livery period mentioned on the other side of this contract furnish to seller complete specifications for all sugar called for herein, indicating the respective quantities of all grades and styles or packing of sugar which buyer desires delivered hereunder, selected from refined cane sugars."

Buyers who purchase under the 30-day contract order the sugar out in a large number of deliveries at various times to various places and in various quantities. There is no regularity as to the quantities which they order. The practice of large buyers as a class does not differ from that of the small buyers in the matter of the quantities in which they order out the sugar under these contracts. We permit buyers to order out sugar against their 30-day contracts in any quantities they desire. In stating the quantities of delivery and the number of deliveries, I intended to include the large manufacturing purchases. In using the term "small quantities" I mean a carload or less. A carload is usually the largest quantity requested to be delivered at one destination. Some of the large customers might order 2 or 3 carloads shipped on the same day to the same destination but that is an exception.

Large buyers take deliveries under 30-day contracts and spot sales in the same manner. "Spot sales" or "spot purchases" are purchases under which delivery is to be made [fol. 1557] immediately or promptly, which is usually considered 7 days. When the purchaser makes a spot purchase he can divide the deliveries among the different stores. If a large customer made a spot purchase of 2,000 or 3,000 bags on a given day he would probably have them delivered at various points where he was doing business and not necessarily take delivery at one point. A customer, in pur-

chasing spot, usually buys what he actually needs at the moment. Customers who normally contract for a considerable number of cars would probably buy less than carload quantities on spot sales, not being willing to take the risk of the market.

There is no difference in price between l.c.l. and carload lots on a spot sale. There is a difference in freight on l.c.l. shipments but not in the refiner's price. There is no difference, in the cost to the customer, between a spot purchase of a carload from consignment and a less than carload purchase from consignment. There is practically no difference between the size of the deliveries taken by the customers, whether large or small, under the 30-day contracts and those taken under spot contracts.

While the carload is regarded in the trade as a unit of delivery, a great many times large buyers take delivery in [fol. 1558] less than carload quantities in consignment and refinery cities. It is not true in non-consignment territory. Even the large buyer ordinarily takes in less than carload deliveries from a consignment point although he would ordinarily take a carload on shipment from refinery to a non-consignment point. Over a given period the l.c.l. deliveries from a consignment point are greater than carload deliveries.

The refiner has no information as to the quantities the customers will withdraw under a 30-day contract, the points at which he will require deliveries or the time the deliveries will be requested during the contract period, except that in the case of an old customer he has some idea as to the general territory in which deliveries might be taken but no idea as to when or as to the quantity that might be requested. The refiner has no advance information as to the varieties that may be requested or whether the customer will request shipment from the refinery or from consigned stocks.

Exhibit D-7 is correct to the best of my knowledge and belief. There is 1 key for one contract of the chain store and 2 keys for manufacturers' contracts not on there.

[fol. 1559] Defendants' Exhibit D-7 was received in evidence.

Exhibit D-7 shows the way in which deliveries were actually taken by the purchasers under a number of large contracts with our company. The first is a contract with one

of our large chain store customers entered into July 14, 1927. The exhibit shows each delivery is invoiced as a separate item. We did not, at the time this contract was made and delivery taken, group in 1 invoice all the deliveries at a given point to a given customer on the same day under the same contract. At the time the contract for 45,000 bags was made on March 25, 1931, with the same company and during the last year or two we have attempted to combine deliveries taken on the same day to the same customer from the same warehouse in order to save clerical work. We combined them on the same invoice provided it applied against the same contract. We do not maintain consigned stocks in small North and South Carolina towns. They were withdrawn in the latter part of 1929 or the first part of 1930.

The fifth contract in the exhibit, chain store customer No. 3, was entered into January 26, 1928, with one of our [fol. 1560] large chain store customers for 14,000 bags and deliveries under this contract were even smaller than the contract referred to previously. Sugar was ordered out in approximately 400 deliveries. Only 4 or 5 deliveries are in carload quantities.

The next to the last contract, a contract with customer No. 2, a manufacturer, was entered into January 23, 1927, and withdrawal was made in approximately 100 deliveries. There are some deliveries of carloads but the greater number of deliveries were all less than carload quantities, some of them running as low as 10 to 17 bags.

If the point designated under the column headed "Point from which withdrawn or delivered" was not a refinery point, delivery was made from a consignment point. There has not been any difference in this matter of the size of deliveries, in the method, time and place at which they were taken in the period before and after the Institute. Some of these contracts were delivered since the formation of the Institute and since the elimination of some consignment points. There are still a sufficient number of con- [fol. 1561] signment points available to permit deliveries as indicated by these exhibits. There are a number of deliveries in Illinois and Wisconsin. There is a whole page of them as shown by the second contract with the first chain store for 445,000 bags.

Our deliveries to large customers as a class are no more evenly distributed than deliveries to all other customers. Our large customers, as well as our customers generally, take less sugar in the winter months. During the peak of demand in the spring and summer they draw a larger quantity.

The figures in Exhibit E-7 are correct to the best of my knowledge and belief.

Defendants' Exhibit E-7 was received in evidence.

The graphs in Exhibit F-7 represent certain features of the figures in Exhibit E-7 and were prepared at the Institute. They are correct according to the best of my information and belief.

Defendants' Exhibit F-7 was received in evidence.

[fol. 1562] So far as I know there never existed in the sugar industry before the formation of the Institute any system of quantity discounts in the sense of openly announced discounts graduated according to the quantity purchased. The general nature of the discounts given in the sale of refined before the Institute was the making of special arrangements by the refiners with the customers for rebates or discounts in order to hold the business of certain customers. Before the Institute, due to a refiner's desire to hold certain business, a small customer would, at times, receive a larger discount than another large customer who also received a discount or a small customer might receive a discount where certain large buyers of considerably more sugar received no discount at all. There was no graduation or apportionment of discounts in accordance with the quantity purchased from our company before the Institute. I have not found any saving to my company on sales to large customers as compared with the sale of a corresponding volume to a number of small customers for the reason that large and small customers both take delivery in the same manner, withdrawing portions of their requirements from consigned stocks. The large [fol. 1563] customers withdraw from consignment to the same degree that the smaller ones do.

If a freight station is situated some distance from a refinery and it becomes necessary for a refiner to truck less than carload quantities, there is a greater cost than there is

in making carload shipments. However, if a freight station is located near the refinery or if it is possible for a refiner to accumulate a sufficient number of less than carload orders to load into a car for a switch movement, there is no difference in cost. At practically all of our refineries the freight station is some distance away and it is necessary to truck shipments. However, we have a very small number of less than carload orders calling for shipment by a railroad direct from the refinery. Usually the purchasers of less than carload lots either take the sugar from the refinery in their own trucks or withdraw it from consignment points.

The contracts set out in Exhibit D-7 are representative of the number of deliveries under such contracts to these and other similar large customers, that is, chain stores and manufacturers, for each of the periods represented. As to some of these contracts, in the early period a separate D [fol. 1564] from C was made for each delivery and an invoice rendered for each D from C. In the latter period we made a practice of showing all deliveries made in one day from one warehouse to the same customer at the same price in one D from C. An invoice was rendered accordingly. In the latter periods of 1930 and 1931 the amount stated under the heading "Quantity withdrawn" is from the total withdrawals on one day from one warehouse for one customer. There is no change in the method of withdrawing by these customers as indicated by the warehouse delivery receipts which are sent in to us. Frequently there would be a number of warehouse delivery receipts against one D from C showing that deliveries were made against the one amount shown on the D. from C.

Between our chain store customers as a class, both large and small, and our jobber customers as a class, both large and small, the jobber customers withdraw, as a general thing, in larger quantities than chain store customers as a group. The proportion of withdrawals in l. c. l. quantities by chain stores would be greater than the l. c. l. withdrawals by jobbers. That is as true of the large chain stores as of the small chain stores. There would probably be a very [fol. 1565] minute saving to the refiner in clerical cost in the matter of deliveries of sugar in carload lots as compared to less than carload lots due to less clerical work and the use of less stationery, but it would be so small that it could hardly be translated into any actual amount that

might be passed along as a discount. It would be a very small fraction of a cent per 100 pounds.

Our company makes deliveries in barge loads to some of its customers. The handling costs are no less on the barge load deliveries than on the carload lot deliveries.

The total quantity of sugar sold annually in the United States could not be increased materially if the special inducement were offered by the refiners to encourage purchases in large quantities unless some new industrial use was found for sugar and in that event a special discount, which reduced the price, might encourage the use of a greater quantity. If some new commercial use was found and the use of sugar depended upon the price, a quantity discount might have the effect of increasing consumption in that particular direction.

[fol. 1566] The business of a large manufacturer who has a few large customers is less stable than the business of a manufacturer who has a number of smaller customers whose total purchases are equivalent to the purchases of a few large customers. I do not know of any substantial saving in cost that the refiner would make in dealing with a few large customers as compared with a large number of small customers. I never had the choice. We seek large customers because the business is attractive and gives us quick volume and wide distribution. We are also greatly interested in small customers. We are interested in selling sugar to all the customers we can secure. I do not know of any action ever taken by the Institute condemning or recommending against the offer by a refiner of a discount or lower price on contracts for the delivery of sugar at regular intervals or an extended period as contrasted with the usual type of contract for the purchase of sugar under a 30-day contract or spot sale.

The complaint referred to in Exhibit 491 came to my attention shortly after it was made. We investigated the circumstances, found that Chinal's statement was substantially true and immediately advised the broker and ware-[fol. 1567] house that we would not permit deliveries to be made to this customer in this manner and that this customer must either withdraw sugar in its own trucks or hired trucks from our consigned stock at Tampa or have it shipped f. o. b. Tampa to it in a like manner with other customers in St. Petersburg. We felt that this arrangement entered into between the broker and the steamship line was

discrimination against other customers in St. Petersburg and in favor of the Tropical Grocery Company. As far as I know, no one in the American organization had any knowledge of the situation until it was brought to our attention by this letter.

American has absolutely not given, either directly or indirectly, any discounts or concessions, rebates or allowances under whatever name not publicly announced, either in the form of terms or of prices since the Institute. It has been the sincere and diligent purpose and effort of our company to follow the practice of openly announced prices and terms since the Institute.

Cross-examination.

By Mr. Rice:

When speaking of the sincere efforts to avoid giving concessions, I meant to include our brokers. It is my belief [fol. 1568] that all our brokers, as well as the members of my department and other departments of American have sincerely and diligently endeavored to avoid giving any concession, either directly or indirectly, to any customer. Excluding the brokers and referring only to American, I believe we have succeeded in following this policy.

There have been instances which this record will show where our brokers have been guilty of either violating or not living up to the spirit or letter of the instructions we have issued. Brokers have diligently and sincerely endeavored to avoid giving any concessions, directly or indirectly, to any of our customers. I believe that if they did not succeed in that diligent effort that the broker was acting in good faith toward American. We instructed the brokers to obey the Code of Ethics as it applied to their business.

All the brokers through whom we accept any business signed the broker's pledge.

Prior to the Institute there was not, that I know of, any system of quantity discount in the sugar industry. There were concessions given by the refiners to the large purchasers before the Institute was formed. Volume of business was one of the considerations, but it was not the sole [fol. 1569] and deciding consideration by any means. We considered distribution in the market and whether or not we had any business in the territory. There were many

instances when a small account was able to do a job for us that a large one would not have. It is not true of our company that the purchaser who could give a large volume stood a much better chance of getting a larger concession. Volume did not dictate the amount of the concession although it was one of the important elements considered by us in determining whether or not we would give it.

Before the Institute was formed American sold to Coca-Cola in very large quantities. Coca-Cola used this sugar in its factories. It is one of the manufacturers using the largest quantities of sugar. It is possible that in 1927 we sold to Coca-Cola in lots of 250,000 bags. The company is not a typical manufacturer due to the large quantities it uses. It usually took withdrawals in carload lots. As far as I know, it never took its withdrawals in larger than carload quantities. Coca-Cola was taking deliveries from all our plants. The 550,000 bags for which it contracted in 1927 was all taken out in carload lots. One car was shipped at a time.

[fol. 1570] After American became a member of the Institute, it adopted as its policy in the sale of sugar to sell for delivery only within 30 days. It did not prevent us from contracting with Coca-Cola on the same basis as we contracted in 1926 and 1927, if we wished to make the open announcement changing our policy. I have heard of many small deliveries made to National Biscuit on American's contract with that company in 1926 and 1927. There were truckload deliveries and less.

The minutes of the Enforcement Committee of May 29, 1930, page 2, refer to a report on the situation that had arisen at Tampa and St. Petersburg. The rate and selling basis were exactly the same at both points. Customers are in a position to have sugar shipped from a refinery to St. Petersburg at the same rate as from a refinery to Tampa and there could be no saving by the customers located in St. Petersburg withdrawing sugar from consigned stocks at Tampa and paying for it on the f.o.b. Tampa basis and having it carried on to St. Petersburg for delivery. The steamship company would be glad to carry it from Baltimore to St. Petersburg for the same rate.

In my opinion there is nothing unethical in the delivery of sugar from Tampa to the customers in St. Petersburg free of charge. American did not put a stop to it. What

[fol. 1571] we did was to correct the irregular situation of the warehouse company at Tampa billing us for storage on the sugar left on the boat. We did not consider that it was a violation of any of our instructions to permit sugar that has been shipped from Baltimore to Tampa on this boat to move on to St. Petersburg, since we billed the sugar to the customer at 25½¢ plus the tare f.o.b. Tampa and he could have secured the same rate by shipment from Baltimore. In both cases the application was 25½¢ not 20¢, so that the only thing we found to correct was the payment of storage which was not earned on the sugar which was left on the boat and that was immediately discontinued. It did not affect the movement of this sugar from Tampa to St. Petersburg.

[fol. 1572] CHARLES B. CASTLE recalled.

Direct examination.

By Mr. Higgins:

Our large buyers generally buy their sugar, as do all other customers, in the majority of cases, under 30-day contracts. In that respect there is no difference, as a class, between large customers and small customers.

Defendants' Exhibit G-7 was received in evidence.

(Petitioner's counsel conceded that the witness would testify similarly on the practice of National under the forms of contracts prior to and since the Institute as White and Place did of American and McCahan.)

There is no difference in the practice of the large customers and the small customers, as a class, in the quantities called for delivery either under contract or on spot sales. The buyer is permitted to call for any quantity he desires. The usual unit of delivery out of town is a carload, while the unit of a delivery at the refinery is a truckload (105 bags). Both large and small customers, as a class, call for deliveries of smaller units and at times there may be several cars called for. There is no difference in the practice of large and small buyers as a class, [fol. 1573] respectively, in the size of the units of delivery which they call for or in the time when they call for deliveries during the contract period. That has been true

both before and since the Institute. We have several customers who call for deliveries of 8,000 to 10,000 bags by small canal boats.

There is no saving to us in making delivery into a barge of a barge load of sugar as compared to our handling and delivery costs on the same quantity into railroad cars.

Defendants' Exhibit H-7 was received in evidence.

There are no contracts prior to February 24, 1928, because the records have not been preserved. The deliveries under these contracts during these periods are typical and normal deliveries under contracts of this character and size.

In the metropolitan area where we make deliveries direct to stores we bunch them all together on one day and render one invoice. Separate invoices are rendered on the out-of-town deliveries. In regard to the metropolitan area covered in the Exhibit, all separate deliveries, no matter how many there may be to the same customer at the same destination, are grouped as one delivery.

[fol. 1574] One hundred and five bags are a 5-ton truck unit. Deliveries to customer D represent various deliveries direct to the various stores of the chain. The item of 2,750 bags represents various truckloads that have gone to different stores.

The invoices are rendered in accordance with the delivery order which is sent to us. There is a list of deliveries to each individual store on the back of the one master order. There may be two such orders in one day for delivery, in which case we do not bunch them. In that case each of these items represents the shipment which we made on the specific delivery order and whether that specific delivery order was for 1 truckload or 10 and whether the 10 different truckloads were to different stores or the same store would be utterly immaterial. There are several small items which represent a grouping of several orders and delivery by one truck. An order of 20 bags does not mean that we would send a 5-ton truck with 10 or 20 bags to deliver. We might group several of those together and have the truck stop off with them. Whether we would bunch several deliveries in one would depend upon the [fol. 1575] emergency or the character of the delivery. That is left to the operating department.

Defendants' Exhibit I-7 was received in evidence.

(Petitioner's counsel made the same concession regarding this exhibit as to similar exhibits introduced by American and McCahan.)

Defendants' Exhibit J-7 was received in evidence.

(A concession similar to the one above was made by petitioner's counsel regarding this exhibit.)

There is no difference between our large customers, as a class, and our small customers, as a class, in the matter of the proportion of their deliveries that they take out in the various months of the year. They run about the same proportion. From early summer to fall are peak periods in all classes of our trade.

Before the Institute there did not exist in the sugar refining industry any system of quantity discounts in the sense of discounts graduated according to quantity purchased. Prior to the formation of the Institute, the dis- [fol. 1576] counts our company gave were based on representations by our trade that discounts of a similar amount could be secured from competitors. They had no relation to any quantity of sugar to be purchased under that discount. It was a discount of so much per bag. Our company granted such discounts to customers prior to the formation of the Institute. None of these discounts were graduated according to the quantity purchased by the customer on the particular contract or at that particular move or at that particular time or during any specific period of time. The size of the concession was determined by the representation that a concession of equal amount could be secured from a competitor. We always believed those representations unless the amount was a terrifically large one.

There would be no saving in handling and delivery charges in connection with purchases by large customers as compared with those by small customers except in the case of less than carload deliveries which involve additional trucking cost. L.c.l. shipments are delivered to the freight station f.o.b. as a rule. The buyer pays the l.c.l. rate which is higher than the carload rate. We make [fol. 1577] no charge for trucking to the freight station because of competition. We have at all times made a practice of selling l.c.l. at consignment at the carload application.

The clerical expenses and the costs attendant upon the sales and deliveries of large quantities to large customers are about the same as compared with the sales and deliveries to small customers. There is some difference in the paper work. It is not material and the saving on it would be a very small fraction of a cent.

A manufacturer or refiner whose customers are large is in a vulnerable position because the danger of losing one of them is a serious menace. A manufacturer with a large number of smaller customers is in a more stable position in that respect.

I do not know of any action of the Institute which condemns or recommends against the offer by any refiner of a discount or a lower price upon contracts for the delivery of sugar at regular intervals over a certain period as contrasted with the usual 30-day contracts or spot deliveries.

According to my knowledge and information, our company has not given any concessions or rebates, directly or [fol. 1578] indirectly, since the organization of the Institute.

Cross-examination.

By Mr. Rice:

Before the Institute the volume of sales was an element in determining whether or not National would give a concession of any sort. If we had a customer using 10,000 or 50,000 bags in a year and he said he had been offered a concession of 5¢ from a competitor, we gave him a similar concession to retain that business. Prior to the formation of the Institute we gave a concession to a customer who would purchase a large volume as well as one who purchased a very small volume. Volume was an important element which we considered in determining whether or not we would give a concession.

[fol. 1579] Fred G. Taylor recalled.

Direct examination.

By Mr. McGratty:

In recent years, competition between the manufacturers of beet sugar and cane refiners has continuously increased,

particularly during the increasing production during the years 1929 and 1930 and there was a substantial increase during 1930 and 1931. There was an increase of over 4,250,000 bags in beet sugar production which resulted in the far flung distribution and brought beet sugar into states where it had never been sold before. It was put into eastern seaboard markets in competition with cane at cane refining points.

Generally speaking, our relationship with the Bureau has been one of friendly cooperation. It has always been recognized that we were organized for practically an identical purpose, that of standardizing and regularizing trade practices and removing trade abuses from the sugar trade; and that our effort was concerned with an identical product, which naturally gave us many problems in common and many common sympathies with respect to certain things that each sought to correct. In that relationship I think almost without exception our methods have merely been to [fol. 1580] exchange information on practically everything that we have done. We have never in any sense felt that we were related or under any obligation other than the obligation of common courtesy to one another. There has been quite a full exchange of information between us. If we discovered that the Bureau was promoting some activity which embraced a problem with which we were concerned, we very likely took up the same activity and promoted it ourselves. I think the same is true as to the Bureau's attitude as to the things we are attempting to do. At no time did we ever coerce or bring pressure upon the Bureau or its members.

I am familiar with the history and purpose of the various successive Code Interpretations relative to the handling of damaged sugar and frozen stocks and all of the activities of the Institute in connection with the sale of damaged sugar and frozen stock by members of the Institute.

Damaged sugar is sugar which has become hardened in the bags or packages at the point of storage or at some consignment point and cannot be sold at the refiner's regular selling price. There are other forms of damage but this is the most common one.

[fol. 1581] "Frozen stock" is a term used to describe sugars which are not salable at the point of storage, sometimes because of improper assortment or because of an excess stock in some given market with the result that excess

storage charges may be incurred or the sugar may become damaged through hardening. "Frozen stock" is sugar that has not actually deteriorated but is in danger of deteriorating because the refiner cannot move it at his openly announced price. It was the traditional practice of the trade, prior to the Institute's formation, for refiners to sell their damaged sugar and frozen stock at a figure below their general selling basis. The Institute has made no attempt to change this custom of the trade. It has never attempted to restrict, prohibit or limit the sale of damaged sugar or frozen stock and is not authorized to do so.

The problem of damaged sugar and frozen stock was first raised by Henderson in February 1928 by their inquiry regarding the Institute's position on that question, and whether it would be a violation of the Code to sell such stock below the openly quoted prices of the refiners in order to dispose of it.

[fol. 1582] (Defendants' counsel referred to Exhibits 430-V and 430-W and Section I-B-4 of the Code Interpretations dated February 7, 1928.)

I discussed with Judge Ballou in May 1928 the purpose of the original recommendation and learned that the purpose was to have information available concerning such sugar in order that he might promptly answer any questions that arose with respect to it. The question would arise if a sale were made at less than the market price and some buyer for the purpose of influencing another refiner reported that he had purchased sugar from a certain refiner at less than his list price. It was in the interest of having this information with which to promptly answer such inquiries that he requested reports to the Institute.

In July, 1928, there was a question of whether frozen stocks should be considered subject to the provisions of the Code, which required that prices be openly announced. The same action was taken with respect to frozen stocks as had been taken in the matter of damaged sugar. The recommendations in Section I, page B-1, paragraph 2 (a), dealing with damaged sugars, and (b), dealing with frozen stocks, proved impractical in operation. They were not [fol. 1583] complied with except in relatively few cases. Out of about 2,000 reports we received on the sale of damaged sugar and frozen stocks during the period from the time these recommendations went into effect on November

26, 1928 until a few weeks ago, less than 100 were reported prior to the sale of the sugar. Some of the refiners have never notified the Institute in advance of selling damaged sugar or frozen stock. Neither C. & H., Western nor the Texas refiners ever made a practice of notifying until after the sales were made.

Referring to exhibits 430-B and 430-H, with respect to the sale of damaged sugar or frozen stock as other than spot transactions, it was stated that since it has always been the practice of the trade to sell such sugar as spot transactions and "as is" without guaranties or other concessions, such practice should be continued. This was merely a stated concensus of opinion recorded in the minutes and no formal action of reducing it to a recommendation was made. I assume that Place took that reference in the minutes to mean some formal recommendation had been made.

The Court: I shall disregard Taylor's assumption as to what Place assumed.

The Witness: I think I might state that the letter could refer to no other thing since he refers to a ruling, and that is the only reference in the minutes of the Institute or these Code books prior to that time, so it is more than an assumption.

The matter covered by the correspondence between the Institute and Federal regarding the sale of damaged sugar [fol. 1584] or frozen stock at Bush Terminal in New York, covered by Exhibits 430-C to 430-F, inclusive, was first brought to my attention by Judge Ballou in December, 1928. He told me that Stone of Spreckels had reported that they had 230,000 odd bags of sugar at the Bush Terminal which they wanted to dispose of as damaged stock and there was a question in his mind as to whether it was in fact damaged sugar within the meaning of that term as ordinarily applied in the sugar trade. He therefore asked that Judge Ballou send someone with a representative of Federal to Bush Terminal to examine this sugar and Judge Ballou selected me for that task.

After examining the sugar with Federal's traffic manager and finding that most of it was in perfect condition, I advised Judge Ballou and Stone that only a small percentage of the sugar could be classified as damaged and even that could be reconditioned at a very small expense of

not more than 3¢ a bag at the outside. I said that most of it could be dropped on the floor and it would be softened to practically a perfect condition.

The next information we had was a report from Spreck- [fol. 1585] els in April. The report was that they had sold 45,000 bags of warehouse damaged sugar in Bush Terminal at a 4.65 basis (Exhibit 433). At that time their selling price was 25¢ higher.

Judge Ballou and I assumed that this was the beginning of the liquidation of this large stock which we had formerly examined and which in our opinion was not properly classified as damaged sugar. Judge Ballou pointed out the lack of consistency of selling frozen stock or damaged sugar at refining points since the logical thing to do would be to recondition it unless the refiner desired to favor certain customers. He suggested to me that I write a letter for his signature, regarding this matter and I did. (Exhibit 430-D.) The purpose of the first sentence in the second paragraph which reads:

"We look with general disapproval upon the idea of disposing of damaged sugars in New York or in the refining points and we would view with alarm any general practice upon the part of the refiners to sell such large quantities as you report at such a substantial concession in this market."

was to reduce to general terms the problem embraced in this specific transaction. We thought that Spreckels was in fact making an unwarranted concession on the quan- [fol. 1586] tity of sugar that was not damaged and, instead of stating that baldly to Spreckels, we wrote this letter covering this situation generally rather than specifically. We did not see that it was anything but discrimination since the reconditioning would cost only 3¢ or 4¢ a bag.

Federal's reply to our letter (Exhibit 430-E) and our acknowledgment of the reply (Exhibit 430-F) terminated the incident.

The sugar referred to in Exhibit 430-P was neither damaged nor frozen stock. Pike wished to dispose of it in a hurry because the lease on the warehouse was expiring in 2 days and consequently a special price was necessary in

order to get rid of it in spite of the fact that it did not fall within the definition of frozen stock or damaged sugar.

Defendants' Exhibit P-7 was received in evidence.

In the printing of May 1, 1930, under Section 1, page B-1, paragraph 2, and the second subparagraph in the Code Interpretations dealing with this subject, appears the following:

[fol. 1587] "Members are requested to report to the institute each instance of sale of damaged sugar giving the date of sale, amount sold, name and location of the buyer, price at which sold and character of the damage. Reports of all such sales will be circularized monthly by the Institute."

I pointed out that the original provision requiring a report prior to the sale of the sugar had not been practical and had not been in fact followed. The former wording was rescinded and these paragraphs were adopted. There was a broad discussion of having these reports circulated to eliminate the necessity of having a lot of inquiries that otherwise might be directed to the Institute regarding damaged and frozen stocks. Such reports would also show that the quantity in fact was unimportant. There was a great deal of disturbance at times in the minds of our members about quantities of sugar until the whole facts of the transaction had been disclosed to them and it was thought that this method of referring only to sales that had actually been consummated and reported to the Institute would indicate the relative unimportance of this traffic in frozen and damaged stock.

Exhibit Q-7 is a report by circular and summary of the sales of damaged sugar and frozen stock for January 1931. It is one of the monthly reports which are sent out by the [fol. 1588] Institute in this connection. The amount of business involved in this traffic of damaged sugar and frozen stock amounted, in the total of our experience, to less than ½ of 1%.

Defendants' Exhibit Q-7 was received in evidence.

A paragraph in Exhibit 430-U, a letter of April 8, 1931, from Colonial to W. H. Hoffman, Colonial's broker, reads:

"You understand that if the sugar is sold at a concession it cannot apply against a present contract, but the

sale must be made as new business, based on our present market quotation. The Institute is very strict regarding this."

The second paragraph in Exhibit 430-U refers to the recommendation against applying damaged sugar or frozen stock on existing contracts. The express purpose and reason for the adoption of this recommendation was to prevent the discrimination which would naturally arise in substituting damaged sugar on a contract that had already been made for standard grades of sugar. It involved repricing the contract and offered an opportunity for the substitution of sugars which were not, in fact, damaged under the title of "damaged sugar". If a broker desired to favor a [fol. 1589] certain customer, he might arrange to substitute damaged sugar on his contract, if the market had declined during the period of his contract. That would be a discrimination because damaged sugar would not be available to all people for such contracts. This regulation did not go to the point of interfering with buyers contracting for damaged sugar or frozen stock as such.

I have never advised any member of the Institute that before it could sell damaged sugar or frozen stock at a concession from its openly announced price it must inform and secure permission from the Institute. The purpose of the Institute in requesting members to give prior notice of their intentions to sell damaged sugar or frozen stock at a concession from their openly announced price was simply to have the information in the event any question arose regarding it, and probably the added reason of being in a position to determine whether or not the sugar was in fact damaged or if it was offered as damaged sugar when in reality it was not. Members sell damaged sugar or frozen stock at whatever concession from the regular price they desire, without any influence by the Institute. The Institute does not perform any function in connection with the matter of damaged sugar and frozen stock other than to [fol. 1590] act as a clearing house for information regarding the sales of this type of sugar.

Defendants' Exhibit R-7 was received in evidence.

Cross-examination.

By Mr. Fly:

To the best of my information all members reported completed sales of damaged sugar and frozen stock. My recollection is that C. & H., Western and Imperial did not give prior notice.

I recall the incident which led up to Godchaux' announcement in August, 1931. A complaint was registered that Godchaux had sold some sugars in certain southern markets as damaged stock which in fact was not damaged stock at below its openly announced price. An investigation was made and Godchaux's records indicated that these sugars had been in fact sold below the market price and were not damaged. Godchaux' sales manager stated that the error consisted in their having been marked as damaged sugars when they were in fact frozen stock. The question arose as to whether they could properly be classified as frozen stock since this was a market in which Godchaux habitually sold or intended to continue to sell. It was stated that [fol. 1591] Godchaux understood that a somewhat more liberal interpretation had been given to the definition of frozen stock and that it was to cover stocks which were not only badly distressed, but stocks which might be difficult to sell in a given market. While such an interpretation was briefly discussed upon one occasion, no action has been taken with regard to it.

We never insisted that members give prior notice of a proposed sale of damaged sugar and frozen stock. Exhibit 430-S refreshes my recollection. I had forgotten we had paid any attention to that phase of it at that late date (February 24, 1931).

Referring to the time limit in Exhibits 430-P and P-7, I think Judge Ballou had merely approved the proposition that Pike had told him of—that he wanted it on that basis and he just agreed to the terms that had already been announced by Pike.

The statement by Judge Ballou in Exhibit 430-I is not consistent with my statement as to the Institute's practice in regard to frozen stock. Exhibits 430-M and 430-N are not consistent with my statement. Judge Ballou's statement in Exhibit 430-D has nothing to do with the dissemina-

tion of information. It is outside the scope of the activities of the Institute in regard to frozen stock which I described.

[fol. 1592] EVAN T. FISHER recalled.

Direct examination.

By Mr. Wyatt:

The collection of statistical information from members of the Institute and others has been under my direct charge ever since the Institute started.

In the beginning of 1928 we collected background statistics regarding melts for the years 1925 to 1927, inclusive, for comparative purposes. We totalled them up by weeks for the industry as a whole and then worked out each refiner's percentage for each year and also for the three-year average. Then, when we started to send out the current melt we sent out those three figures to the refiners as a yardstick to measure their performance during 1928. We reported to each member his own percentage of melt for the prior years. The information could have been worked out from the totals which we released but we worked out the total percentage, as we have always done, as part of our statistical service.

The statement from the Institute of May 8, 1928, addressed to Savannah is typical of the reports which I sent out during this period. The figures are different for each report. The one that went to C. & H. would have their percentage. We continued to send out these reports for a [fol. 1593] period of two or three months and then changed the form to include other information that we had not had when it was first shown to me. We requested the information in Institute's Report No. 1 in 1928, asking members to go back to the first of the year and send in these blanks. Report No. 1 is typical of the reports received from the members. There has been no change in it. The information received from members was totalled up and sent back to the refiners, first in the form of the earlier report and then later as the "A" report.

The "A" report came some time before the "B" report. The "A" report is again different for each member and includes considerably more information than the first one, Exhibit S-7. On the report marked "B", the letters which appear are key letters, each standing for the name of the refiner. The refiners all have printed cards showing the keys.

Most of the members reported information at one time or another to fill in the spaces described on Report No. 1 as "New Business entered and deliveries for the week." National, American and Arbuckle, who did about 54% of the business done by all of the refiners, refused to give that information. When we found that we definitely could not [fol. 1594] get that information from them, all the rest of the members stopped reporting.

I always considered that the most valuable statistical information we could get. The purpose was to secure information as to supply and demand. The demand is the amount of the unfilled orders that stand on the refiners' books. We have never been able to get that information because the refiners would not supply the figures. We have the melt and deliveries but they are not the demand. While the members reported this information they told us through this report what business they booked on any particular move and what proportion of the business from time to time was undelivered, which information we could not otherwise have obtained.

We received information from some members at the time the report was first made. During 1928 and 1929 it was only used for the preparation of 2 charts, one for each year, showing the amount of business booked and the rate at which deliveries were made against those bookings. In December, 1929, we started sending out that information only to the members who reported. That continued until May, 1930. Then we found it was going to be impossible to get the other 3 members who were not reporting the informa- [fol. 1595] tion to give it to us and the ones who were reporting it decided that the returns we were making to them were not worth the effort unless the picture were complete. As a result they all stopped.

Shortly after Exhibits 419-F-1 and 419-G-1 were sent out, I asked Van Buren, who was then in our office, to see what could be done with these reports, sales and deliveries.

These letters were prepared by me in conjunction with Van Buren. We found the members had not used any sort of uniform system in reporting this information and it was impossible to discover what deliveries applied against what sales so Van Buren and I got together and drafted Exhibit 419-F-1 to get members to use a uniform system in reporting. We took one of the blanks which the members used to report the information and made up a sample, filling in a set of imaginary figures on the blank. That letter describes the figures which we had put on the blank in order to try to get the members to use that system in sending in future reports.

The expression "regular explanation" which appears in the second paragraph of Exhibit 419-F-1 referred to the report of damaged sugar and frozen stocks which were being sent to us at that time. We listed on this sample blank 1 [fol. 1596] or 2 attempts which showed an imaginary sale of damaged sugar.

We wanted a symbol to indicate what was damaged or frozen but we did not want the members to suppose from that that we no longer wanted their regular reports on damaged sugar and frozen stocks which showed the location of the stock and to whom it was sold. We released the information on that Report No. 1 to others than Institute members. It went to our trade list and all over the world. The information on that report which we released was the melt and deliveries of the 15 United States refiners. Exhibit T-7 is such a report as I have described. Attached to it is a copy of the trade list.

Members of the Institute told us their deliveries by states on "Report No. 2", which is typical. We entered the information in our records, found the total deliveries of all refiners in each state and sent out a blank exactly similar to that, so far as the information is concerned, which gives the total in each state. That is Report "C".

The information that went in Report C-2 came off the same No. 2 blank that shows the deliveries by states. All the refiners furnish that information to the Institute. We receive such information from the Domestic Sugar Bureau [fol. 1597] once a month and from the importers of refined sugar. We used that information to compile Report C-3. We sent out reports similar to Report C-3 at regular intervals. We sent them to the Domestic Sugar Bureau, the

15 United States refiners and the members who furnished the information.

In connection with the figures which the Institute received as to deliveries by states, we requested and obtained from Edgar information which we termed as "Edgar's redistribution". The reason is that under the Godchaux contract Edgar took delivery of great quantities of sugar at certain destinations, such as Indianapolis, Mounds or Cairo. Then he took that sugar and moved it from states in which he had received it into other states where it was ultimately delivered to his customers and, in order to have our deliveries by states as nearly correct as we could get them, we asked Edgar if he would give us the movement of sugar from one state to another. He did that for the two years that the Godchaux contract ran.

We did not correct weekly our figures for deliveries by states on the basis of Edgar's redistribution figures. We did it at the half-year point and again at the end of the [fol. 1598] year. Those reports came in from Edgar in the form of a letter, saying "minus Indiana 100,000 bags" and "plus Wisconsin 50,000" and "plus Minnesota another 50,000", or something like that.

We released to the trade figures which we obtained regarding deliveries of cane and beet sugar by months. We released that information approximately once a month to the same trade as shown on the list in Exhibit T-7. Exhibit U-7 is typical of the reports which we made.

We obtained information once a week on "Report No. 3" as to the amount of sugar on consignment. It was totalled by states and cities shown on Report No. 3 and sent back to the members as a total for each of those states in each of those cities. We sent them to the members once a week.

Report D is typical of reports sent back to the members on the basis of the information received on Report No. 3. The lists of cities did not always remain the same. We were trying to take important key points originally and then the consignment points in some states were reduced and we took those that were left in that state if there were not too many.

We obtained from members once a week information as to the amount and location of sugar stored in transit. Report No. 3-B is typical. We totalled the information re-

ceived from Report No. 3-B for all refiners and sent it back to them once a week.

[fol. 1599] We received information on Report "No. 4" once a week from members as to the movement by eastern differential routes. We totalled the information and sent it back to the members on 2 other reports. Report No. 4 is typical of those reports. The printing is not changed but the typewritten destination is written in as the sugar is delivered to those points. We send the information to all 15 refiners on 2 blanks, F-1 and F-2, one showing the movements at the customers' request and the other for the refiners' own account. The documents lettered "Report F-1 and F-2" are typical of the reports.

Once a week we receive on Report No. 5 similar information as to movements by 7 differential routes. It was totalled and sent back to the members. We made a slightly more elaborate study of these 2 barge routes than we did of the differential routes and gave certain percentages comparative with prior years, but the basic factors are the same for both reports. I reported the information received on Report No. 5 and on Reports lettered "G" and "G-1".

[fol. 1600] I received information as to the amounts of sugar of differential routes, other than for Reports 5 and 4. We received on Report No. 6 information as to the special charters made by the refiners with barge companies whose rates did not come under the jurisdiction of the I. C. C. We included that information in the F Report which we sent back to the members. I made other specific reports to members in connection with the figures which I have just described other than the regular weekly or monthly reports which I mentioned. We gave out a quarterly report which gave the accumulated totals that these blanks did not give in most instances and we endeavored in these reports to point out interesting information. We sent out certain exhibits with those reports that do not go out at other times, such as the per capita consumption at the end of the year and things of that sort.

Report No. 13 is the annual report for the year 1931. It is typical of the annual, semi-annual and quarterly reports that we regularly ran so far as the statistical information is concerned. The typewritten information covers [fol. 1601] the first information but is not the same in each report.

I have given all the statistical reports which I rendered to members of the Institute on information which I received in connection with the distribution of sugar.

The information which I received and which may have previously been covered includes reports on damaged sugar and frozen stock, the undelivered balances at the end of the contract period and warehouse, freight and broker's book statistics. For a short period we collected statistics on customers who were slow in sending in their specifications and taking out their sugar.

We made other requests for melt figures covering the period before the Institute was formed. In September 1928 the Statistical Committee held a meeting and instructed the Institute to obtain certain information, which they did. The instruction was in writing. I was not a member of the Committee. Exhibit V-7 is a report of the Committee on Statistics.

Defendants' Exhibit V-7 was received in evidence.

[fol. 1602] After the rendition of the report of the Statistical Committee, Exhibit V-7, we prepared a large table of the refiners' capacity and melt and which tabulated those figures as laid out by the Statistical Committee and sent it to all of the members. Exhibit W-7 is the table of refiners' capacity and the meltings to which I have referred. We made up a formal table at the end of 1928, another in 1929 and one in 1930. Exhibit W-7 is an example of the tables. The only difference in the other 2 is that the last 2 or 3 columns are different. In making up these two latter reports I requested of the members information as to their meltings for the years before the Institute. The Statistical Committee asked for averages for certain years. We tried to move those averages up each year. When we got the report the year after this one, 2 of the members sent in the averages that the Committee had requested. The rest of them sent in the actual melt figures and let us make up the averages ourselves. The 2 members who did not furnish us with the figures that we requested in that connection were Arbuckle and Pennsylvania. Pennsylvania subsequently gave us the figures we wanted. Arbuckle never has. Except on the occasions to which I have just testified, I [fol. 1603] have never requested from the members any information as to their melts prior to the formation of the

Institute. I have released to the members information as to figures for the years prior to the Institute other than in the form of the reports to which I have just testified. We sent out to the members and to all the people on that trade list a total melt by weeks of the membership as a whole for the years 1925, 1926 and 1927. We received that information as a result of our letter of February 1928 in which we asked for those 2 years by weeks. That is the extent of the activities of the Institute in reporting these figures.

In connection with the release of these figures as to melts, both for the period before the Institute and after, I did not make any comment or suggestion as to the use to which the figures were to be put. In connection with the various requests which I received and sent to members of the Institute I did not make any suggestion or comment as to the use to which the figures should be put. We did not even send out a letter of transmittal with those statistical reports.

Defendants' Exhibits S-7, T-7 and W-7 were received in evidence.

[fol. 1604] FRED G. TAYLOR recalled.

Redirect examination.

By Mr. McGratty:

At the time Exhibit 430-D was written we thought the 35,000 bags referred to in Exhibit 430-C were in fact good sugar being sold as damaged sugar under a subterfuge which we considered to be a direct violation of the Code of Ethics. It was the only instance of damaged sugar being sold at a refining point. We were probably mistaken because we were thinking in terms of the 230,000 bags of sugar which Spreckels had asked us to examine and which we did not think we should classify as damaged sugar. We supposed this was the beginning of the liquidation of that stock as damaged sugar. Subsequently we learned it was the residue of 230,000 bags and was finally disposed of under the classification of damaged sugar. The balance was sold as regular sugar.

The subject of contract enforcement has been with the Institute continuously since its inception. As early as Feb-

ruary, 1928, Judge Ballou gathered statistics bearing upon the unfilled and undelivered contracts of the refiners. They indicated that there were various delays in enforcement and that there were various out-right repudiations of contracts. They particularly disclosed that among the various [fol. 1605] refiners there were some buyers who were chronically delinquent.

A 30-day contract is entered for units of 100 bags but it is mutually understood by the buyer and seller that this is only a formality and that some time prior to the expiration of 30 days the buyer will furnish "specifications" of various grades of small bags and packaged sugar in place of the 100-pound bags named in the contract. Therefore, the refiner is not in a position to fill the order of these purchasers until he has received the specifications and, while the contract provides that he may ship 100-pound bags in the absence of specifications, as a practical matter he could not well do that. The buyer would naturally reject 100-pound bags if his requirements were for specialties and the refiner would incur the ill will of the purchaser. In reality, the refiner is at the mercy of the buyer who may delay for one reason or another to supply these specifications. It is the failure of the buyer to furnish the specifications within the stipulated period which prevents the refiner from shipping out the contract.

Commencing in April and continuing on through the balance of 1928, efforts were directed toward the fixing of some [fol. 1606] carrying charge for sugars which might be carried on account of the buyer's failure to supply specifications within the required time. A great deal of thought was given to this matter of fixing or assessing a storage charge. At one time it reached the point of a recommendation by the Directors that such a charge be fixed and it was referred to the Executive Committee in order that the details of such a plan might be worked out. Subsequently, however, the Executive Committee reported back to the Directors that it was unable to make recommendations that seemed to meet all the requirements of the problem and therefore nothing was done about it.

(Defendants' counsel referred to and read the minutes of the Directors' meeting of April 12, 1928.)

The minutes of the Directors' meeting of January 18, 1929, read:

"The matter of enforcing the withdrawal of sugars at the end of the thirty days in accordance with the buyer's contract by the imposition of a carrying charge on unwithdrawn sugars was discussed. Upon objection by several members to the imposition of such a charge, no action was taken."

I remember discussions which took place during 1928 in connection with the original recommendation and the discussion at this final meeting. At some of these last meetings Place and Abbott said that if the warehouse charge of 5¢ [fol. 1607] per week for the first week and 2½¢ thereafter, which had been suggested, was assessed, the trade would look upon it as a stringent measure to cause them to take their sugar immediately and the question might arise as to whether that was to be assessed immediately upon 1 or 2 days' delinquency. On the other hand, if they should put a low charge for this enforced service, it might encourage certain buyers to leave their sugars with the refiners and thus put the refiners in the warehouse business, which they did not want.

Commencing in May, 1929, the so-called Enforcement Committee was appointed to the task of making a special study of this question. After some study was made by the Enforcement Committee they brought recommendations to the Directorate in June.

(Defendants' counsel read the minutes of the meeting of June 27 at which the Enforcement Committee submitted its report to the Board of Directors and the resolution adopted at that meeting further stated that the resolution was incorporated in the Code Interpretations under Section I, page D-3, paragraphs 4(a), (b) and (c).)

After the adoption of this recommendation, at the closing of each contract period, members sent to the Institute reports of their unspecified and undelivered balances which were in turn compiled on a single sheet and distributed to members. They show the delinquent contracts held by each [fol. 1608] refiner without revealing the names of any customers. Each refiner reported to the Institute the total number of bags of sugar on his books for which specifications had not yet been furnished although the due date had already passed. The Institute then compiled these reports sent in by the different refiners and circulated them to the

members. The refiners gave only their total of unspecified or undelivered sugar without allocating it to the contract.

I do not think in reality that any of the refiners followed the recommendations made that they exercise, if they deemed advisable, the option of shipping the unspecified balance in 100-pound bags as called for by the contract, if the customer did not furnish specifications for the assortment within the period specified by the contract. There may have been 2 or 3 unimportant gestures made by the refiners to do that but in no important instance was it ever attempted.

The refiners themselves indicated that it was wholly impractical to do so. We had cases where delinquencies occurred and we asked why they did not conform to the resolution and deliver 100-pound bags and in each case where we made this inquiry we were given some excuse as to why [fol. 1609] it could not be done. There were no formal reports made to us regularly and systematically each month, as to whether or not they had done it.

In 1930 it was thought that this problem might be met on the basis of the members themselves submitting to a voluntary assessment for their failure to effect deliveries under the provisions of their own contracts. The matter was referred to Cummings with the request that he review it with respect to the legal privilege of doing such a thing and submit a recommendation that might be adopted covering that purpose. The resolution which he prepared was approved by the Executive Committee and recommended to the Board of Directors for adoption at an Executive Committee meeting on September 24, 1930.

The minutes of the Directors' meeting of November 20, 1930, read as follows:

"The question of a voluntary assessment for failure to effect delivery in accordance with the provisions of sales contracts, which had been discussed at the directors' meeting September 25th, was again discussed. Mr. Moog reported on behalf of the Executive Committee that it had not yet been able to work out the details of the amount of the assessment, its effective date and exceptions. The Board voted to table the matter until further information and details could be obtained."

The resolution was not adopted subsequent to that date. [fol. 1610] It never came to our attention after that time.

No voluntary assessment has ever been made upon members for non-enforcement of their contracts.

(At the request of petitioner's counsel Defendants' counsel read the resolution on page 5 of the Executive Committee minutes of September 24, 1930.)

So far as I know none of the 3 recommendations have been carried into effect.

There has been a decided reduction of indulgence with customers with respect to the delays of supplying specifications and withdrawing sugars.

Recross-examination.

By Mr. Rice:

I understand by "discrimination" that the refiners indulge in the practice of allowing certain buyers to delay specifications and that in so doing they are discriminating against those who regularly put their specifications in on time.

Petitioner's Exhibit 497 was received in evidence.

At the Executive Committee meeting on September 4, 1930, the question did not arise as to the legality of contract enforcement. There was no discussion at the meeting to the effect that the discriminations were illegal. I do not recall at the moment any member of the Institute stating or suggesting that he might become liable under the Clayton Act for discriminating between his customers but it would not be at all surprising if I were mistaken and found that there are records in the minutes because we had discussed many things. I could not give a positive answer. I could not say that such a discussion had not been had.

[fol. 1611] JOHN L. MANY, JR., was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Browning:

I am with the firm of William Henderson operating the Henderson Sugar Refinery at New Orleans, Louisiana. I

have managed the purchases of raw sugar and the sales of refined products since the spring of 1927 and assisted in that work prior to 1927. I have been with Henderson about 25 years. It is the smallest of all the refineries.

Prior to the formation of the Institute Henderson had never given any concessions or rebates from its openly announced prices or terms.

In 1927 what we thought was an evil was a matter of growing importance. We saw our customers disappearing and had every reason to believe that they were doing it because of some unfair practice. We discussed it many times because we were using a lot of red ink and wanted to stop it if we could. The two obvious remedies were to resort to the same devices that our competitors had employed or to tighten the margin by making our basis very much lower than it had been and so make the cost to our competitors who were giving inside concessions so heavy that they could not withstand the punishment.

[fol. 1612] We did not adopt the concession method of doing business, although we talked it over a dozen times, because we didn't think it was honest. We did not have sufficient capital to try the second remedy and reduce our openly announced price to the lowest that anyone was getting with a concession. By the end of 1927 we had taken a great deal of punishment. We had lost a great deal of money. The truth is we were really contemplating stopping the refinery.

Late in 1927 we received an invitation to assist in the formation of the Institute. We discussed it — length but took no action. Then we were requested further, and, after talking it over, like drowning men clutching at straws, we decided to try it out although we doubted it would amount to anything. We ultimately accepted the invitation. Henderson was represented in the meeting in New York in December 1927 by William Henderson and myself.

The past practices of the refiners were discussed at those meetings. Cummings said that the matter had been under consideration and that he had been in touch with the Department of Justice for some time and that the thing was feasible and possible from a legal standpoint. A lot of [fol. 1613] refiners still did not trust each other any more than Henderson or I trusted some of our competitors in

the South. We still felt that the meeting might end up with a lot of glittering generalities or platitudes which would sound all very well but would not get the industry anywhere. Finally one of the refiners described his method of giving concessions. That seemed to open up the floodgates for in a very short time the other refiners made similar statements. That spirit of frankness, when all the cards were on the table, did more to carry the series of meetings to a success than any one thing. I know it convinced me that that frankness was the winning card. It was the solution of all our problems. They described whether concessions were by a straight payment at the end of the period of time or whether they used warehousing or paid them off in the warehousing or advertising allowances, or any of those schemes by which it is easy to conceal a price concession different from your basis price. Some used one method, some used another and some used combinations. The allowance ranged from a few cents, brokerage, for example, which is only 4½¢ or 5¢, up to as high as 20¢ or 25¢ a sack for one or two of them. It was a heavy [fol. 1614] load. Judge Ballou of C. & H. and Goetzinger of Arbuckle said that their companies had not been giving any secret rebates. There might have been one or two more in that same class but I think on the whole the major part of them admitted to some form of concession or secret practice.

One of the first things that Cummings told us after his conference with Mitchell's office, or perhaps with Mitchell himself, was that the question of price was absolutely taboo and neither at that meeting or at any others was that question brought up.

I recall that control of melt was mentioned at those meetings but I cannot recall off-hand whether it was suggested by some refiner speaking to me when I was at one of the meetings or whether it was formally put on the table. I think it was but it was immediately considered as an improper subject for discussion and we did not get any further than that. I never heard the subject discussed again at any Institute meeting or outside of one.

Henderson joined the Institute because it stood for exactly what we stood for and if all these important refineries came around to the Henderson way of thinking, naturally

we would be willing to go along with them. We were sure [fol. 1615] we would do good business and make money if these practices were adhered to. We believed that we could compete on even terms with our much larger competitors on a system of open prices publicly announced. We still believe so. We joined the Institute because we thought it was a way of making money. We wanted the Henderson refinery to survive which, as I have already explained, looked as if it might not do. The competition of 1927, as is perfectly evident, would undoubtedly have eliminated Henderson and probably a number of other small refineries, leaving the powerfully capitalized ones to control the field and we would have much less competition without the Institute than would have continued to be the case with the Institute.

We are interested in any statistical service furnished by the Institute. Anything that has to do with giving accurate knowledge about the industry is necessarily of value and the Institute's statistical service is of considerable value to us. Some parts are of little or no importance but others are of considerable importance.

Henderson has given no concessions to anyone since the Institute was formed.

I attended about one-third of the Directors' meetings of [fol. 1616] the Institute but only one meeting of the Executive Committee. I have never heard any discussions of price or price propaganda at any of the meetings of the Institute or outside. I have never asked any representative of any refiner to advance, maintain or decline a price. No one else in the Henderson organization has done so as far as I know. No representative of any other refiner ever asked me or anyone else in the Henderson organization, so far as I know, to advance, maintain or decline a price. No member of the Institute staff has ever taken any interest in refiners' prices aside from their open announcements.

I have a great deal to do with the determination of Henderson's price policy. I make price changes if it looks to me that the market conditions justify it, either up or down, or leave them alone. It is entirely a question of getting the best possible price.

I recall when delivered prices were announced December 1929 for the Warrior River area of Alabama, Kentucky, Tennessee and Indiana. I followed those announcements. I did not know any competitor was going to make such an

announcement prior to receiving it in the usual way. After [fol. 1617] receiving the announcements I talked over their value with William Henderson and determined on our policy of reducing some of our freight losses by making a similar announcement.

The basis of any action we took on an Institute recommendation was the selfish interest of Henderson. If we thought it was good for us we voted for it, adopted it and announced it and if we thought it was bad we worked against it. I have no recollection of anyone ever telling me that Henderson had to follow any recommendation. We felt if we had followed a recommendation by making an announcement along the lines of that recommendation we had to go along with it until we made a counter announcement. We were under a moral obligation to live up to what we said we would do. We felt free to make a counter announcement at any time, but if it was in the open and we announced it, it was up to us to stay with our announcement.

Exhibits 391-Q-Q-Q-Q, 400-B-2, 431-L and 400-V are letters which I wrote. I remember unhappily my letter to L. C. Watkins, our broker in Columbus, Georgia (Exhibit 391-Q-Q-Q-Q). He had signed a pledge, but at least in one direction we found he was not living up to the Code and its [fol. 1618] Interpretations about consigned stock. The truth is, although I knew perfectly well what the rules of the Institute were and believed in them thoroughly, it was just the weakness of human nature to use the Institute as a sort of buffer to excuse some of our actions that a letter of that sort was written. I am sorry to say that I was blaming the Institute for a policy which I thoroughly believed then as I do now. I used it as a sort of goat. That was not an Institute policy about warehousing. It was our policy.

In regard to the Middleton letter, that warehouse was found to be affiliated and since we found it to be the case we told our broker there to clean up the stock and find another warehouse in that city. The Middleton broker did not exert himself to clean up the stock. We were on record as wanting to clean that stock out and the Institute wrote us from time to time asking us why we didn't report that it was cleaned out. I used that precisely the same way as I did the Watkins letter, in the loose way that most businessmen write letters, by expressing it badly and saying that the Institute was hot on our trail, as if that was the reason we wanted the stock cleaned out. We did not want

[fol. 1619] an affiliated warehouse there because it would mean discrimination against one of our other customers. We blamed the Institute in our letter because naturally in the sales department you want to keep your brokers in a good frame of mind. If you tell them dogmatically that you want this, that or the other thing done, even if you are perfectly right, they sometimes get sore, whereas, if you keep them in a good frame of mind—well, this was just a lazy man's way of letting another person be the goat for something that they are not really responsible for. That also applies to the other two letters. I am sorry I have written quite a few letters along that line, different ones having different attendant circumstances, but that is the basis behind them.

I am familiar with the increase of consignment points in the States of Illinois and Missouri. It is a problem that had taken a good deal of our study. It had a very marked effect on our selling practices in those states. It is obvious that a small refinery like ours could not offset consignments in such a large number of points, the actual consignments of sugar requiring the laying out of a greater amount of money than we could possibly stagger under. If you multiply an additional car of sugar by the number of consign-
[fol. 1620] ment points from Missouri, Illinois, Iowa, etc., you will find that the total amount of money involved comes to a big sum which was more than we could handle, so we just had to move out of those states because if there is a consignment point in a town and you do not put in an offsetting consignment, it greatly reduces your chance of selling sugar in that market.

Defendants' Exhibits X-7 and Y-7 were received in evidence.

I recall sales of sugar to buyers in Louisville around 1930 for shipment by the American Barge Line. Those shipments got stuck in the mud near Louisville and it was over 2 months before the buyers got the sugar. I don't remember whether Altscheller was one of them.

In his letter Altscheller stated that we refused to sell him f. o. b. New Orleans again for shipment by the cheap barge rate. My recollection is that although we sold him the original cars for shipment by the American Barge Line, those shipments were sold and paid f. o. b. New Orleans but the buyers didn't pay until after they got their goods,

[fol. 1621] which gave them about two months' use of our money, contrary to terms. When they offered to buy again on those terms, we refused because they had not lived up to the terms of sale.

Exhibits 457-D-6 and 457-H-6 are correspondence between us and the Andulasia Brokerage Company of Andulasia, Alabama. On May 27 delivered prices were withdrawn and we announced barge rates for barge shipments and rail rates for rail shipments. This answer indicates that Hershey was trying to give rail shipments with barge application and we were convinced that Hutchins and Billop, Hershey's brokers in Mobile, had misunderstood their advices from the Hershey people in New York. I wanted to wire the Institute to see what the Hershey announcement really was, to show Hutchins and Billop and, if they had misunderstood the situation as I thought they had, to have the Hershey principals in New York correct them in their announcement. That is what I referred to by the expression "We are going to try to block it" if the announcement was incorrect. We were going to have the Hershey principals in New York straighten out the incorrect announcement made by Hutchins and Billop in Mobile.

(Defendants' counsel referred to Exhibits 457-J-6, K-6 and L-6.)

[fol. 1622] Defendants' Exhibit Z-7 was received in evidence.

In Exhibits 457-K-6 and 457-L-6 I used rather extravagant language to refer to what was really a simple announcement by Hershey as can be seen from Exhibit Z-7. I did not discuss with Hershey or any representative of theirs its policy or practice at the time. Even though I expressed my wire and letter badly the fact remains that I was not in direct communication with Hershey or his representative at any time but had in mind this announcement which was on record in our office. As a matter of fact this correspondence was of no particular importance because the whole freight situation broke down in one day to exactly what our broker thought was true of Hershey at the time. Though I stated in my letter of March 19, 1930, to the Connors Brokerage Company of Memphis (Exhibit 457-C-5) that I discussed this matter with representatives of other refiners, I am sorry to say that I had not done so. I mean,

not that I am sorry that I had not done so, but the letter as written was an exaggeration of a very definite idea I had. My idea was that if Memphis was put back on the [fol. 1623] barge rate for barge shipments and rail rate for rail shipments it would only be a matter of a very short time when we would have the barge rate no matter what form of transportation was used. Events proved this because one of the New Orleans refiners put in the barge rate for barge shipments and rail rate for rail shipments, and in no time Savannah, who could not compete on that basis, broke the whole situation back again to the barge rate no matter how the goods moved.

Cross-examination.

By Mr. Fly:

In regard to my testimony that separation of functions of warehousemen and brokers was adopted by the Henderson refinery independently of our competitors and independently of any Institute action, what I meant was that we had found as a matter of practice that it was necessary to divorce the handling of stock through brokers' warehouses and the brokerage function because there was leakage going on all the time. That was brought up before one of the Institute meetings and we believed it was a good policy so we subscribed to the idea and advised our brokers to that effect. At the same time and pursuant to the same Institute action, all of our competitors did the same thing. [fol. 1624] In Exhibit 431-L my statement—

"There is no doubt at all in my mind that in a very short time the Institute would have forced us to discontinue the connection"—

was an overstatement and was false.

Referring to Exhibits 457-G-6 and 457-H-6, I will say that we had a Hershey announcement that did not read the same way that Hutchins and Billop had interpreted it and in saying "If Hutchins' announcement stands up", it was my idea that they were wrong and I really meant to block the Mobile brokers of their interpretation of the announcement. I did not mean to block the New York office of this announcement. I used the word "Hershey" loosely. I

thought our only chance of straightening it out was from the top. I did not mean through the Institute, but through Pike's office and of course I figured that the Institute could handle it more adequately than I could directly with Pike. I had written letters to him on what seemed to be a reasonable question but he was in the habit of not answering for several weeks and sometimes I did not even receive the courtesy of a reply.

In my statement in Exhibit 457-L-6—

"Hershey had agreed to only make shipments on day our barge moves through Mobile, which is Monday"—

I should have said that they made an announcement to that [fol. 1625] effect. Pike evidently wanted to save the situation because the breakdown would have cost him money and would have cost us money too. We were loading the barges on Saturday for weekly shipment from New Orleans. Those shipments were to have arrived in Mobile on Monday and were to have been trans-shipped from there. Since Pike already had stock in Mobile he planned to wait until the boat arrived in Mobile on Monday and ship out that day. It was a barge and rail movement and only by using that method once a week would he be in exact competition with us. The situation lasted only a very short time and then went back to the barge rate whether the shipment moved by rail from Mobile, New Orleans or anywhere else.

On June 30, 1930, almost at that exact moment, the whole Southeast broke down to the barge rate and stayed there no matter what form of transportation service was adopted so the whole thing was out and it didn't make any difference whether they took any action or not.

Referring to Exhibit 457-C-5, I had a great deal of correspondence with Memphis jobbers on the subject of putting that city back on the barge basis. Memphis is right at the corner of 3 states and during the period of deliv- [fol. 1626] ered prices was suffering more than Arkansas because of the disadvantage of the rate situation. No matter how they took the sugar there they were paying the rail rate while across the river in Arkansas that was not the case. As a result Memphis lost the Arkansas business. Our representative at Memphis talked with the Memphis buyers and I talked it over with Connors. I am certain

we did not talk it over with our competitors because it was to our advantage to continue the same way.

Letter number 4, which states

"The other refiners doing business in that market who did not enjoy the barge routing said, in a very plain and unmistakable way, that if we did they were going to put New Orleans shipments barge rate again."

is inaccurate, false and misleading. I did not talk it over with competitors because I wanted that situation to stay as it was. I did not want to break it down because it was money in our pockets not to.

Prior to the formation of the Institute I received a report regarding the price situation and the different concessions. I was able to tell at what price sugar was moving and the different concessions, in a variety of different ways. Sometimes our brokers would make a statement which we might or might not believe to be accurate. Very [fol. 1627] often some of our own friends would tell us they were getting this or that concession. They would tell us in so many words what they were getting and ask us if we could meet it. Sometimes it was a brokerage concession, sometimes warehousing, advertising—it was a variety of different ones. Then it was just a question of whether we believed the man who told us. Either he was telling the truth or not. Generally speaking, you could not tell. Some, however, I believe were actually telling the truth.

I could not strike any price level at which the bulk of the sugar of any of the competitors was moving. We kept on making sales right along to a smaller and smaller percentage of our customers, which would show there was not a definite cut in price but a sort of flexible concession by which they bargained with different people on different levels.

I felt that if my competitors had any regular selling basis, a price at which everybody could buy sugar, that I could have sold sugar in considerable quantities at that level.

They had a list price which was one thing and a selling [fol. 1628] basis which was another, then they had their private trades which was the third and it was on the very rarest occasion I got what would be called legal proof of

these concessions. The refiners were perfectly frank in telling us what their selling basis was but it would not sell the sugar. It would to a certain number of customers but it did not to the rest of them, which would indicate that they were getting something. Concessions started in 1926 when we still enjoyed a good volume of business at openly announced prices. The situation became a little bit worse in 1927, but in the later part of 1927 it changed very rapidly so that it was impossible to say at any one moment whether 25% or 10% or 15% were getting something. We were shooting in the dark.

We adhered to our openly announced price, which was the same as the other refiners said was their selling basis, took what business we could get and just lost sales. We lost heavily in volume in the latter part of 1927.

I thought that an important number of our competitors' customers were getting something below the refiners' basis price. It might have been 5 points under, it might have been 7 or 10 or almost anything, but in fact I did not know what it was or how widespread it was until those meet-[fol. 1629] ings we had in December before the organization of the Institute.

The different refiners did not have different selling bases in their territory. Competition makes all sugar sell on the same basis. It has always been so, as far as I can remember, with very few exceptions. We all had the same basis all over the country.

Redirect examination.

By Mr. Higgins:

I observed the selling basis of our competitors in all parts of the country and knew about them. I knew that American, at times, was selling in New York at the same basis it was selling in New Orleans and I knew whether C. & H. was selling in the western territory on the same basis they were selling in Chicago. In the day before the Institute C. & H. and Western sold west of the Rocky Mountains at a higher price than they did in the Chicago, St. Louis and Kansas City territory. They made their pick-up on sales west of the Rockies. I do not think it was often the case that American and other refiners who sold in the Northeast, North, Mississippi Valley and New Orleans had different selling

bases in other territories outside of ours as compared with the selling basis in our territory. Practically all the time [fol. 1630] they had a uniform basis. In the cases where C. & H. had a higher price in the 11 western states than their price in the Chicago territory they were openly announced. They were base prices f.o.b.

Petitioner's Exhibits 498 and 499 were received in evidence.

(Petitioner's counsel referred to Exhibits 419-B-1, 419-U-1, 419-K-3 and 419-B-4.)

Petitioner's Exhibit 500 was received in evidence.

[fol. 1631] JOHN W. SYMONS, JR., was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am a wholesale grocer connected with Symons Brothers & Company, whose headquarters are at Saginaw, Michigan. We also have branch houses at Jackson and Alma. I have been president of the company for 11 years and run the business. We have been doing business about 50 years and cover the eastern half of Michigan, exclusive of the City of Detroit and some territory in the central portion of the state. Our operations are generally regarded as the second largest in the State. Lee & Cady of Detroit, is the largest.

Prior to the formation of the Institute in 1928 we received concessions. We bought a considerable amount of sugar from American who gave us 5¢ a bag on granulated and 20¢ on softs. The amount of these concessions was not written into the contract. We were paid by checks four times a year.

We bought sugar from National who consigned it to our warehouse and paid us storage of 5¢ a bag. That was the total we received regardless of how long it stayed there. We were the only ones who drew on the storage. It was not [fol. 1632] ordinary consignment which was available to

others. That was the only concession we received from National.

We had only a "dummy" warehouse. We set up a fictitious name known as "The South Water Street Warehouse" which was just a means to collect storage. It was located in our building. It was just a name. We had some dummy officers and printed a letterhead so that we could render bills for storage. The sugar was stored right in our warehouse in the regular place of business of Symons Brothers & Company. We did not keep it separate from our regular stock. As we needed a bag of sugar or several bags of sugar to fill an order, we took it from that stock.

We did not report withdrawals promptly but tried to take advantage of market movements. If we could sense a declining market, we waited until the decline took place and then reported the sugars which had been withdrawn before the decline. This began in 1926 or 1927. This was our practice and I was informed it was other people's practice. We felt that we were pretty much on an even keel with the prices quoted by other wholesale jobbers doing business in our territory prior to the formation of the Institute, except [fol. 1633] in the instance of the Edgar organization in Detroit.

They did business in our territory. They sold to retailers. They had a line of "cash and carry" houses established all through the state operating under the name of the Isbell-Bean Company which sold to consumers and retailers. Occasionally we met the Edgar prices as a matter of policy. We could not afford to sell sugar regularly at the price they could. We sold to some customers at their prices and to some we did not. We could not profitably compete. The prices quoted by Edgar were pretty close to our costs.

There is a Wholesale Grocers' Association in our state called the Michigan Wholesale Grocers' Association. I was president from 1925 to 1929. I am a member of the National Association of Wholesale Grocers and member of the Executive Committee. I am familiar with Exhibit A-8. On January 27, 1926, a resolution was adopted by the Michigan State Wholesale Grocers' Association. We made the resolution public, and sent it to the principal refiners, American, National, Arbuckle and Federal and the trade papers. Subsequently, at the instance of the

[fol. 1634] Michigan Wholesale Grocers' Association I came to New York and took up the matter of this resolution with the refiners in person. I felt that the situation that was developing in our state had a monopolistic tendency and was putting the ordinary wholesaler out of the wholesale business and if something could not be done to stop it, we would be at a very serious disadvantage. We adopted the resolution at that time.

Defendants' Exhibit A-8 was received in evidence.

Cross-examination.

By Mr. Rice:

At the time we obtained the 5¢ concession on granulated sugar from American we were already buying about 12 cars a year from them. This concession had a tendency to draw all of our business and until National offered us the storage arrangement American received all our business. Prior to this time we bought the bulk of our sugar from Federal. When beet sugar was off the market, we probably bought 6 cars a month from Federal and when beet was on the market a car a month was a big supply for our Saginaw house, which I am referring to.

[fol. 1635] We generally used about 600 to 800 bags a week split between beet and cane. The total volume of all sugars handled a year prior to this arrangement was 60 to 65 cars a year.

The arrangement with American was offered to us by Deerie, their representative, and Brown, Assistant Sales Manager of American at that time. They solicited our business and, in return for a bigger slice of it, we were to receive this concession. Thereupon we immediately shifted over from Federal to American. I did not make any false representations to American to get that concession. I am positive that we did not represent to American that we were getting a concession from some other refiner which we were not, as a matter of fact, getting. We have never done that.

The arrangement with National was entered into about 1927 after the American arrangement. Irons, an employee of Keiser & Company of Detroit, represented National in dealing with me.

We had a satisfactory arrangement with American but we never knew how satisfactory our concessions were. We never knew whether the other fellow was getting more than we. We had no way of knowing.

I intimated to Irons that we would like to get a consignment stock. I knew how the matter was being handled by other jobbers and I wanted the advantage of the delay [fol. 1636] of reporting withdrawals. I did not say anything to him about the delayed withdrawals. I did not feel that I was acting dishonestly in delaying reports of withdrawals because it had become a practice in the trade. We were up against competitive conditions and it was a case of fighting the devil with fire. I was deceiving the refined because I wanted to act on a competitive basis.

The Court: I am frank to say to you, Symons, that you are making a very bad impression as a witness on the Court. I am telling you that in order that you may be a little more responsive and frank in your answers.

Refiners knew about the practice of delayed billing and it is my belief that they knew we were delaying the billing since it was more than a coincidence that reports would come in for a substantial amount of sugar after a decline and just previous to an advance. They never complained.

[fol. 1637] FRANCIS E. KAMPER was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am a retail grocer of Atlanta, Georgia. C. J. Kamper Grocery Company has been in business for 52 years. I have been the head of the business for the last 10 years. I sell sugar. I am a member of the National Association of Retail Grocers and was its president in 1922 and 1923.

We have 4 retail stores and a warehouse, all in Atlanta. We have had 4 stores since 1926, 3 since 1924 and 2 since 1923. We had only 1 store prior to that time, excepting the 2 other periods when we had some branch stores.

In the years 1926 and 1927 we could not meet the prices quoted on sugar by our competitors, the C. D. Kenny Company, The Great Atlantic & Pacific Tea Company, a local chain store now the Southern Grocery Company, Piggly-Wiggly and a few other merchants who were constantly featuring sugar at cut prices. During 1926 and 1927 their prices were more than our cost most of the time and frequently less than our cost. During 1926 and 1927 we handled about 25 bags of 100 pounds each per week. After [fol. 1638] 1928 we were in a much better competitive situation and prices quoted by our competitors were not as low or as far under as they had been in times past. We have been able to compete satisfactorily with the chains since 1928 although we do not meet their prices. We do not have to meet their prices because we give credit and make delivery.

There has been a very perceptible change in the volume of our sugar business since 1928 because we have been interested in sugar since the organization of the Institute. We have found that we have more profit and can sell it to our advantage. Prior to 1928 we did not push the sale of sugar. Since then we have been pushing it with increasing interest from year to year. We push it through advertisements in newspapers, window displays and through some 31 telephone salesmen. Right now we are moving 50 to 65 bags a week. Our increased interest in sugar since 1928 has been due to the fact that competitive conditions have been better. We have come nearer meeting the chain prices. We have never met their price except on special sales once every month or two. Since 1928 the prices of the chain stores to customers have been, as far as I could figure, [fol. 1639] usually 10% to 12% above our cost.

Cross-examination.

By Mr. Fly:

We sell to customers at an average advance of 20% above cost and about 8% or 10% above the chains. That has been our practice for approximately the last 4 years although not on all products. It is on sugar and a good many advertised brands of merchandise which are used or have been used as a football by the chains.

We have pushed the sale of standard fine granulated sugar from any one of the 5 refiners who have warehouse stocks in Atlanta. We draw from warehouse stocks. All sugar is billed direct by the refiner but it comes from the warehouse stock. We do not buy from a wholesaler. Ordinarily we take delivery in a minimum of 100 bags at a time. We do not take in carload lots because it is not necessary. We get the same price on less than carload lots as on carload quantities. That has been true since the organization of the Institute. The sugar is hauled from the warehouse by our own trucks, or a public dray. We pay the delivery charges. Today they are 4¢ a hundred. It would not be cheaper for us to store our sugar because [fol. 1640] we are a mile and a half from a side-track. We could not get carload deliveries at our warehouse since we have no switch. If we buy a carload and have it delivered to our warehouse, we have to pay the drayage on it. The location of consignment stocks there serves a real economical purpose for our business.

Redirect examination.

By Mr. Peck:

Our total sales in dollars for

1926	were	$900,757.02
1927	"	856,015.26
1928	"	826,259.22
1929	"	824,262.74
1930	"	816,395.99
1931	"	680,685.89

Mr. Peck: The volume of business in dollars and cents of the Morton L. Marks Company, of Davenport, Iowa, from 1926 through the first 6 months of 1932 is as follows:

	1926	$894,398.52
	1927	693,817.36
	1928	664,715.47
	1929	625,606.31
	1930	579,287.79
	1931	558,663.80 and in the first
6 months	1932	289,325.71.

Defendants' Exhibit S-6 was received in evidence.

[fol. 1641] CHARLES DUNCAN was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am a wholesale grocer connected with Morton L. Marks Company of Davenport, Iowa. The company and its predecessor have been doing business 30 years and I have been connected with it since its organization. I was secretary of the old company and secretary and treasurer of the new. I have managed the business during the entire period. Our company's operations have covered a wide territory within a radius of 100 miles around Davenport. We sell C. & H. cane sugar almost exclusively. Prior to the formation of the Institute our company received no concession whatever on the sugar which it purchased. We always paid C. & H. the list price.

Prior to the formation of the Institute, C. & H. consigned sugar to our company. We had consigned stocks in 1925 and 1926 and the early part of 1927. We had the consigned stock in our warehouse which was our place of business until the spring of 1927 when all the sugar was sold. We drew on the stock as we required it. We did not report with-
[fol. 1642] drawals of sugar promptly as we made them. We generally made reports about the time we needed more sugar. There was no special time for reporting. During the period the market was a little bit weak, and whenever my conscience bothered me to the extent of making a report, I made it. I did not always report the sugar at the price prevailing on the date of the actual withdrawal. I have reported sugar as withdrawn at a lower price when it was actually withdrawn at a higher price. That was the general rather than the occasional practice. The difference was sometimes substantial. There was one occasion in July 1925 when we reported 600 bags as having been sold when the market was down 35¢ a 100 from the date that we actually withdrew the sugar. We sold that sugar on the basis of the higher price.

In the year 1926, we were able to meet satisfactorily the prices quoted by other local jobbers in our community. We had more or less trouble with a Chicago concern named Childs, and with a large jobbing house in Peoria. They

made prices that were so low we could not meet them. Their prices were just about the same as our cost. We did not [fol. 1643] meet their prices.

In 1927 there was a change. W. H. Edgar & Son, of Detroit, had a stock at its disposal in one of the warehouses in Davenport. From March 1927 until January 1, 1930, they sold direct to the retail trade at our cost. We did not meet Edgar's price. As a result of Edgar being in the market he sold practically all the sugar. Our sales went way down. On January 1, 1930 he ceased operating in Davenport and since that time our sugar business has come back. Sugar sales in 1926 were 23,678 bags; in 1927, 15,907; in 1928 11,017; in 1929, 8,207; in 1930, 11,597; in 1931, 25,100 and in the first six months of this year, 12,400. The jobber's chief interest in buying sugar is to buy at a price that enables him to meet competition. The price is secondary if he is on an equal basis with his competitors.

Cross-examination.

By Mr. Fly:

Price is secondary, so far as the jobber is concerned, because he must be on an equal basis with his competitors. So long as we are on an equal basis with our competitors it makes no difference, within a reasonable range, what we have to pay for sugar.

[fol. 1644] We have not been buying sugar at lower prices than our competitors. I do not know what our competitors pay, but I know what the list price is. We have paid the list price and I assume they have paid the same. We saved as much as 35¢ a bag which we kept. My complaint as to Edgar and Childs was that they were actually selling to the retailers at a lower price than we could sell to them.

We carried no sugar on consignment in 1927 because C. & H. withdrew its stock. C. & H. did not do anything preliminary to discontinuing the consignment except to tell us that they were withdrawing it. Our average saving, due to this consignment, was worth at least 10¢ a 100.

The gross profit on a 100 pound bag of sugar is about 18¢, the net is around 10¢. Today our net profit is a little more than 10¢.

We put in a consignment stock because the offer was made to us by Bates, a local representative of C. & H. He told us we could make reports when we used the sugar or as we used it. He did not tell us we could withhold the reports for sometime after we had used it. We did it because we knew our competitors were doing it. Neither Bates nor any representative of C. & H. complained to us [fol. 1645] about withholding the reports. We withdrew the sugar as we needed it.

In 1926 our average withdrawals were 77 bags per day. We reported withdrawals in quantities of sometimes 100, sometimes 200 and in July 1926, 600. That is when we made the saving of 35¢ a bag. Neither Seavey and Flarsheim nor C. & H. nor any of their representatives took us to task for that report. We continued to carry consignment stocks after that. During the time that we were carrying these consignment stocks, they did not make any complaint to us as to alleged irregularities in the way we handled the business or in the way we made our reports.

I talked to Henry Dart's Sons, of Rock Island, Illinois, and Van Patten, of Davenport, Iowa, regarding their consignment system. I also spoke with Charles Hewitt & Sons Company, of Des Moines, and T. M. Gobels & Company, of Clinton. In July, 1925, Dart told me that they were reporting just as we reported. In the beginning we made our reports very promptly.

At one time we could sell C. & H. sugar for 5¢ or 10¢ more than we could sell American.

Redirect examination.

By Mr. Peck:

The time that I refer to that we could get more for C. & [fol. 1646] H. sugar than American was before W. H. Edgar & Son entered the market. After they came into the market the situation changed. They handled American and sometimes other brands of sugar; and the dealers, because of the saving, bought it. We found out at that time that they would take one brand just as quickly as they would take another.

I never told C. & H. or anybody connected with them, or Bates, that we were delaying reporting of withdrawals.

[fol. 1647] FRED G. TAYLOR recalled.

Direct examination.

By Mr. McGratty:

The four-payment plan as originally practised consisted in giving a buyer a contract under which he was permitted to take immediate possession of a carload of sugar, which remained the property of the refiner, with a provision that it should be paid for in equal instalments each week for 4 weeks. The contract further provided that the buyer must withhold at least ¼th of a carload and pay for it each week. The original plan also provided that, in the event the buyer should withdraw more than ¼th of a car within the first week or any succeeding week, the total amount withdrawn should become immediately due and payable. In the event of a decline in the price, the buyer was protected against loss by such decline on the amounts that would be withdrawn within the week at the end of which settlement was effected for that portion of the car. In the event of an advance, the buyer might exercise a call privilege, which would entitle him to fix the price of the sugar but under that call privilege he was required to withdraw immediately and pay for such balance that existed at the date of the call. [fol. 1648] Within the past two years, various changes have been made with respect to the plan. Now, if the buyer withdraws a total carload in the first week after it is shipped to him he is only obligated to pay for it in 4 weekly instalments. Now, a buyer may exercise his call privilege, fixing the price at any time before the advance and still retain his privilege of withdrawing in weekly instalments. Originally, this contract was written to provide for the sale of only 1 carload of sugar, but now it may apply to any quantity a purchaser desires to buy.

Originated by Savannah some years prior to the formation of the Institute, this plan was offered only in North Carolina, South Carolina and Georgia. At the time of the formation of the Institute the other refiners did not offer the plan in territory where Savannah did not offer it. It was very objectionable to the balance of the refiners in its original form because it embraced the same opportunities for abuses attached to storing sugars in customers' warehouses. The refiner had to depend upon the purchaser for

reports of withdrawals, and there existed the same opportunity as existed in buyer-owned warehouses, of delaying [fol. 1649] the reporting, thus extending the credit terms of the purchaser and in some instances delaying them to a point where they passed the period of price declines, and making the decline effective on sugars that had already been sold by the consignee.

The report of the Committee on Southern Consignment Points of June 6, 1929, recommended various consignment points in the South, the addition of Atlanta as a consignment point, and the practise of trade consignments on the four-payment plan be discontinued in Georgia. (Exhibit 389-A-1.) The territory in which the four-payment plan was offered was extended 2 or 3 months subsequent to that date. In late November, Savannah announced the spread of the application of the four-payment plan to the states of Florida, Georgia, Alabama, Mississippi, Tennessee, Kentucky, Indiana and Illinois. Within the course of a few days the other refiners followed this announcement. About 4 or 5 days subsequent to the original announcement by Savannah, they sent another announcement in which they withdrew Illinois, northern Indiana and northern Kentucky, the northern part of Kentucky being described by a line from Louisville to Lexington and thence on to the eastern border of [fol. 1650] the state at about Williamson.

Exhibits 447-C1 and 447-D1 were sent because after this withdrawal was announced by Savannah, every other refiner except Henderson announced a withdrawal. In reviewing our records we discovered that Henderson had not made his announcement and under the assumption that he had announced it but simply failed to advise us, I requested him to send us a copy of the announcement which I assumed he made.

The explanation for the sending of the circular in connection with Pikeville (Exhibit 420-V-1) is as follows: At the time Oxnard of Savannah announced the withdrawal of the territory which I have described, he also announced that from this termination point, which was Williamson, he would exclude the jobbing points south along the Great Sandy River. Upon receipt of that announcement, Cody called the Institute and inquired as to whether we knew whether or not Pikeville, a town of less than 3,000 people, had been excluded. He stated that it was not exactly on the

Great Sandy River but it was in the Great Sandy Valley, a short distance from the river; and that it was included in that jobbing area where an exclusion of it would lend con-
[fol. 1651] fusion to the trade by reason of part of the jobbing points in that valley being one one side of the line and part on the other. He asked me to find out whether or not Savannah had intended to exclude that and whether they were in fact selling there. Savannah told me that while their description had not exactly indicated that Pikeville should have been excluded, that it was their intention, as they did not sell there. Therefore I sent the letter in which I said it was intended to exclude Pikeville in the original announcement, meaning that it was Savannah's intention to exclude those points in which they were not selling. My whole purpose in the matter was to interpret for the balance of the members, or to assist by interpreting just what Savannah intended to include in that exclusion. My interest primarily was in the belief at that time that the four-payment plan was a violation of the spirit, at least, of the Code of Ethics. I definitely related it to the storing of sugar in jobbers' warehouses. This was the first time that such a problem had come to me and it came 2 or 3 weeks after Judge Ballou's death.

[fol. 1652] Exhibit 420-K-1 refers to an advice from Sullivan & Cromwell in connection with a circular which we sent out. Subsequent to the sending of that circular, Lamont of Sullivan & Cromwell advised me that the territory in which the four-payment plan might be applied was nothing with which the Institute should concern itself. Since that date we have only interested ourselves to the point of inquiries that may have been directed to us as to whether or not it was being applied under proper announcement.

Defendants' Exhibits B-8 and C-8 were received in evidence.

Aside from the recommendation of the Southern Consignment Committee on June 6, 1929, with reference to the state of Georgia and the attempt to clarify the Pikeville, Kentucky boundary situation, the Institute has never attempted, to the best of my knowledge, to limit or define in any way the territory in which the four-payment plan was offered. There have been many changes in the territory
[fol. 1653] in which it has been offered in the past few

years. In fact, at the present time the four-payment plan is offered everywhere east of the 11 western states.

(Defendants' counsel referred to and read recommendations made by the Institute in regard to this matter in a resolution adopted by the Executive Committee meeting of July 9, 1930.)

The Institute received a letter from National in July, 1930 asking whether or not any of the refiners were absorbing switching charges at points other than Indianapolis. We directed an inquiry to the refiners selling in Indianapolis, asking the question. With one exception, they all stated they were not absorbing switching charges there and had never done so. The exception was Godchaux who stated that they had no record of having recently absorbed switching charges there but that if a buyer should ask for a carload delivery of sugar to be transferred from their consignment stock in Indianapolis to the buyer's warehouse that it would be their disposition to absorb the switching charges or probably at any other point where such services might be required. This led to the adoption of the resolu- [fol. 1654] tion and recommendations which have just been read.

The general practice throughout all my contact with the sugar industry had been, with the few exceptions referred to in the minutes, that the delivery of sugar at consignment points was completed at the warehouse and that any expense of delivering it to a buyer either by truck or by rail carrier or by any other means, was at the expense of the buyer. That was the traditional practice in the sugar business, and when I received this communication indicating that that was not the understanding or the practice of the Godchaux organization, I construed it to be the rendering of a service without adequate charge, in violation of the provisions of the Code, and therefore brought the question with the correspondence to the attention of this Executive Committee meeting referred to. The Executive Committee referred it to the Traffic Committee. The Traffic Committee referred it back and this resolution was adopted on July 9, 1930. The recommendation made by the Board of Directors on September 25, 1930, was subsequently incorporated in the Code Interpretations under Section VII, page 1, paragraph 4: "Absorption of Switching Charges," [fol. 1655] but was not followed by the members.

From time to time refiners announced additional exceptions to this rule and during the course of the next few months there were added Louisville, Kentucky, Rochester and Buffalo, New York, Cleveland and Toledo in Ohio and Detroit, Michigan, where each refiner stated that he would absorb the switching charges for one or another reason. Subsequently, in May of the next year, I pointed out that these continued exceptions had the effect of really nullifying the purpose of the resolution and that it should be rescinded.

(Defendants' counsel read from the minutes of the directors' meeting of May 21, 1931, at which the resolution was rescinded.)

That provision of the Code Interpretations is no longer in effect.

Paragraph 3 under "General Rules of Procedure and Powers of the Executive Committee," Exhibit 457-R-6, reads as follows:

"Combined effect of resolutions: Where a member has signified its intention to follow a recommendation of the Institute, such member should thereafter promptly do so and continue to do so until after the expiration of ten days from receipt by the Institute of notice from such member to the Institute that it intends to cease following such recommendation."

[fol. 1656] This paragraph no longer applies to announcements that switching charges would be absorbed at any point. All that is required now is an open announcement without any previous notice.

Split billing is a term used to define the practice of establishing credit terms on the basis of the minimum provided in the carriers' tariffs at destination territory. It originated with the western refiners. The prescribed carload minimum from eastern and southern markets in the middlewest territory was uniformly 60,000 pounds. From the West to the same territory the minimum was 80,000 pounds and, in order to equalize competitive opportunities in that market, the western refiners established the practice of billing 60,000 pounds as immediately payable or payable seven days after arrival and the balance of the car, 20,000 pounds, was handled on a deferred payment basis of

14 days after arrival, both carrying the regular 2% discount. At present very little is sold on split billing terms. Practically all sugars in the country are sold on the regular 30-day contracts, payable 7 days after arrival at 2% discount. This principle of split billing was not a thing de- [fol. 1657] sired by the Institute but developed as an accidental thing under this discrepancy of railroad tariffs. The sugar industry, as long as I have been connected with it, has been generally opposed to the idea of selling consumable merchandise on a deferred payment basis wherein the merchandise might be sold and consumed before payment is due.

The Institute has taken no position with respect to the deferred payment feature, but it has felt that it was unsound economically and also discriminatory to base payment terms upon such a variable factor as the minimum provided by the various carriers' tariffs, which change from time to time, and not only in different territories, but at different times in the same territories.

(Defendants' counsel referred to Section III of the Code of Ethics and Exhibit 386, a series of telegrams between C. & H. and the Institute in February 1928 following the report of C. & H. split billing on 60,000 pound shipments to Texas.)

[fol. 1658] In April, 1929, it was reported to the Institute that C. & H. was split billing in El Paso and vicinity, making a first billing on a basis of 36,000 pounds, notwithstanding the minimum for that territory was 60,000 pounds. It was in direct violation of our Code which we believed C. & H. was following. In our exchange of correspondence we learned that it was its intention to continue this split billing for reasons which they stated. When Judge Ballou discovered that, he brought it to the attention of a subsequent meeting.

(Defendants' counsel read the minutes of the meeting of the Board of Directors of June 27, 1929.)

Subsequently C. & H. abandoned the practice of split billing at the so-called adjacent points with the exception of El Paso. C. & H. and the Institute members continued the practice of split billing at El Paso.

On September 1, 1929, the 80,000 minimum moving from the West Coast to middle western markets was reduced to 60,000 pounds, thus eliminating the necessity of the exception which our interpretation carried. Prior to this time [fol. 1659] there had been developing a situation due to the activities of the western beet producers in relation to the intra-state minima that were provided for in the carriers' tariffs in various beet-producing states, particularly the Dakotas, Minnesota, Wisconsin, Iowa and Nebraska. The range of the intra-state carload minimum was from 33,000 to 40,000 pounds. The beet producers further west shipping inter-state and selling in these states against the competition of the producers who were using the intra-state rates had adjusted their policy to conform to the intra-state rates, and were in fact split billing in all of these states.

Other conditions had developed prior to this period of time in which southern members had desired to extend their markets into some of these states where the intra-state minima were in effect and where they had not previously sold. They had urged the Institute to change its policy with respect to split billing in order that they might be put in position to enter these markets without competitive disadvantage. There was also an effort being made to secure the membership of the C. & H. in the Institute, and this was a point of difference between their practice and the an- [fol. 1660] nounced policy of the Institute at that time. Therefore our policy with respect to split billing was modified to conform to the one already announced by the Domestic Sugar Bureau.

Following the circular letter from Judge Ballou to the members dated September 20, 1929 (Exhibit 420-F-2) members were free to split bill to meet any of the various intra-state carload minima.

The subject of split billing is no longer a live question today. It has ceased to have any significance because during the past year the four-payment plan has been extended to all of the territory to which split billing formerly applied. The four-payment plan is in effect in all territory east of the 11 western states, and under the terms of that plan buyers pay for their carload of sugar in quarterly instalments, regardless of the minima.

Cross-examination.

By Mr. Fly:

The first extension of the four-payment plan, including about eight states, occurred in November, 1929. It was extended from that time until by February of this year it encompassed the whole area east of the 11 western states.

[fol. 1661] Defendants' Exhibit D-8 was received in evidence.

[fol. 1662] Louis V. Place recalled.

Direct examination.

By Mr. McGratty:

The only position taken by the Institute and the members on the question of contract terms was that as a corollary to prices openly announced, the terms had to be clearly expressed so there would be no confusion and so they could be equally applied to all buyers without discrimination. That was the basis of all discussions.

At the meeting of the Executive Committee on November 27, 1928, I urged the authorization of a Special Committee to recommend a uniform definition of "date of arrival" and the computation of the discount period. Such a committee was authorized and I became a member. It held two meetings, December 3 and December 6, 1928. Exhibit 420-T is a copy of the minutes of the meeting of the Committee on December 3 and Exhibit 420-U is a copy of the minutes of the meeting of December 6. The committee submitted a report to the Board of Directors which was modified and eventually recommended for adoption by the Board at the meeting of February 4, 1929.

[fol. 1663] We arrived at the definition:

"Arrival at destination by rail means date on which the free time granted by the carriers for unloading commences to run, as indicated by railroad's car demurrage records, whether at hold yard, classification yard, public team track or private siding."

by discussing the definition which each refiner was using and taking the most liberal definition of "arrival" which could possibly be taken.

In arriving at the definition contained in the second paragraph reading:

"Arrival at destination by water means the date at which vessel first ties up to dock at destination to discharge cargo.",

there was very little difference in the practice of the refiners, but this again was the most liberal. Some refiners considered that when a vessel arrived in the port, that constituted "arrival"; whereas others waited until the vessel had tied up at the dock so that that was the most liberal.

We used the definition contained in the third paragraph reading:

"If buyer instructs that car be held or delayed in transit, the date of such instructions shall be considered the date of arrival, in case of failure by carrier to deliver the car within thirty (30) days from date of shipment, the thirtieth day from date of shipment shall be considered as date of arrival.",

because that was the practice of all refiners as expressed [fol. 1664] at the meeting.

The definition contained in paragraph 4 reading:

"Date of arrival of shipment reaching destination after 5 P. M. shall be the opening of business on next business day",

did not have very much importance because our definition of arrival, based on the demurrage, was the car demurrage records and railroads consider that a shipment arriving after 5 P. M. has arrived the next day so this was really more a repetition of it, and in actual practice would have application only in the case of water shipments.

"Terms of payment on each delivery hereunder: At Seller's option, Cash, less two per cent., before delivery, or Cash within seven days after the date discount period commences, less two per cent., if paid within such period,"

are historic terms that have always been quoted in the sugar refining business. All refiners in one way or another

provided for a change in terms in case of any change in credit of the buyer. Furthermore, since these contract forms were used not only for the buyers who were buying on credit but also for the cash-in-advance customers, it was necessary to make provision for both. The phrase [fol. 1665] "At Seller's option, Cash less two per cent. before delivery" was not new. It was in all contracts in one form or another.

Referring to Exhibits 420-T and 420-U, in the sugar business there has always been considered 3 days of grace. A payment which comes within 3 days after the expiration of the 7-day period is considered satisfactory, and that is universally recognized. The Operating Committee thought that it would be well to incorporate that in the contract by changing the terms from 7 days to 10. When it came before the directorate a suggestion was made that if we changed the terms from 7 to 10, the buyer would still continue to take the 3 days and it would be actually 13 days. I am afraid our grace is increased. We are more "in grace" than we were before.

Sub-paragraph 1 under "Date Discount Period Commences" reading:

"On deliveries from refinery by truck, the date discount period commences is the date of delivery to truck",

is perfectly obvious. Everybody's practice agrees on that.

Sub-paragraph 2 reads:

"On deliveries from consignment, the date discount period commences is the date of withdrawal order."

That was everybody's practice. The only invoice date [fol. 1666] that we could have was a D from C report. The D from C was used because it was the date on which the sugar was released to the buyer, and it is on that D from C that we base our invoices.

Sub-paragraph 3 reads:

"(3) On all-rail shipments and on all other shipments not otherwise provided for below, the date discount period commences is the date of arrival at destination."

That was nothing but the 7 days after arrival terms that had always been quoted and was an effort to take care of all shipments other than those specified.

Paragraph 4 reading:

"(4) On combination rail and water shipments to Lake Michigan ports and to territory west of the Indiana-Illinois state line, where the ruling freight basis is higher than the freight rate over the route used, date discount period commences is three days after shipment",

reflected the practice reported by all refiners at this committee meeting.

Discussions concerning paragraph 5 which reads:

"(5) On shipments moving via Mississippi Warrior Line or other Mississippi River barges to territory where the ruling freight basis is the all-rail rate, and on all-water shipments to Lake Ports west of Buffalo, date discount period commences is seven days after date of shipment,"

commenced at the meetings of December 3 and 6, 1928.

Again, the Operating Committee merely adopted the com- [fol. 1667] mon practice that was reported by the refiners present. As recommended by the Operating Committee, the original definition worked out at the meetings in December read:

"On all-water shipments to Lake Ports west of Buffalo, and on shipments moving by Mississippi Warrior Line or other Mississippi River barges to territory where the ruling freight basis is higher than the freight rate over the route used, discount period commences four days after date of shipment."

If the discount period was made 10 days and commenced 4 days after the date of shipment the period within which the buyer would get the discount would be 14 days after shipment.

At the meeting of January 18, this report was submitted. The Godchaux representative said he did not agree with paragraph 5 as reported by the Operating Committee, and that he would continue his practice at that time which was to give arrival terms on barge shipments to the Great Lakes territory around Chicago, Milwaukee and the state of Illinois where the rail rate was being applied. That was contrary to the definition recommended on December 6, 1928. Under the definition of December 6, 1928, arrival

terms would not apply in territory where the lake-and-rail was the freight application because the lake rate was [fol. 1668] higher than the barge rate. Godchaux's practice was quite different in that respect from that of the members present at the meeting of December 6 and when he made the objection, the recommendation was brought down to the basis announced by the refiner whose terms were most favorable to the buyer. At the meeting of January 18 we changed the recommendation. Under paragraph 5, as contrasted with the paragraph recommended at the meeting of December 6, the sub-paragraph which was adopted on February 14, arrival terms would apply on all barge shipments into territory having a rail and lake application, and shipping terms would apply only on shipments into territory having the all-rail application.

In the minutes of January 17 and 18, Judge Ballou reported the action on this paragraph 5 in the following words:

"On all trade shipments to Lake Ports west of Buffalo, and on shipments via Mississippi Warrior Line or other Mississippi River barges to territory where the ruling freight basis is the all-rail rate, discount period commences four days after date of shipment."

I pointed out to Judge Ballou that under this wording, the phrase "where the ruling freight basis is the all-rail rate" could be construed to apply not only to Mississippi [fol. 1669] Warrior shipments, but also to all freight shipments to lake points west of Buffalo, so that when the meeting of February 14 considered this subject, Judge Ballou made a report of my criticism, and thereafter that paragraph was changed to read:

"On shipments moving via Mississippi Warrior Line or other Mississippi River barges to territory where the ruling freight basis is the all-rail rate, and on"—

so that this clause modified only the Mississippi shipments. The clause then continued:

"—all-water shipments to Lake Ports west of Buffalo, date discount period commences is seven days after date of shipment."

This clause regarding the all-rail rate did not modify the all-water shipments from the East.

As eventually adopted on February 14, 1929, this paragraph represented the more liberal practice that Godchaux was following in connection with this manner of shipment. In the case of this paragraph, just as in the case of any other, when there was any difference it was brought down to the most liberal practice. Under the provision of this paragraph, to the territory in Illinois and Wisconsin where the ruling freight basis announced by refiners was [fol. 1670] the rail and lake, the water shipments from the East were on payment terms of 14 days after shipment, whereas the payment terms of barge shipments from New Orleans were 7 days after arrival, so that the eastern refiners were at a disadvantage. When the eastern refiners realized in what position they had been placed, they immediately broke down the payment terms on water shipments from the East to 7 days after arrival, the same as the barge shipments from the South. That was started on March 15 by National and all refiners followed. That action was contrary to the definition in sub-paragraph 5 of the resolution, and the recommendation adopted on February 14, 1929.

When the New York refiners started quoting arrival terms on all-water shipments, Moog of Godchaux of course was licked. He had been met and the advantage he had obtained by the change at the meeting of the directors of January 18, was lost. He came into a meeting in April and said that he thought that after all, the arrival terms were not proper. He had had a change of heart on the subject and he thought that the practice which had always been followed by him in the past, of 14 days after ship- [fol. 1671] ment, was the proper thing. He thought we should go back to the recommendation made by the Committee at the meetings of December 3 and 6, 1928. The other refiners were all glad that they adopted that and said they had no particular reason for wanting arrival terms. Eventually everybody went back to shipping terms, including ourselves.

The following paragraph in the minutes of the directors' meeting of April 11, 1929, refers to the meeting that I have been discussing:

"The New Orleans refiner who, at the January meeting, had dissented from the report of the informal operating committee as to payment terms on barge shipment, signified his willingness to base such terms upon shipment instead of upon arrival, when shipping into territory taking a higher selling basis than the actual rate used. Upon this announcement other members who had been quoting arrival terms on all-water shipments from New York, announced their intention of changing these terms based on shipment, thereby bringing all terms of payment upon differential routes into substantial conformity with the recommendations of the informal operating committee, made in December."

It was understood at these meetings that all of the refiners would adopt the resolutions that had been worked out but there was no agreement that they would not change them. The series of definitions recommended for adoption by the members on February 14, 1929 have been of no importance since the breakdown of the freight rates in May [fol. 1672] 1931. Since then the terms on all types of shipments have been arrival terms and in actual practice, whenever the money is tendered to us, we take it.

I can recall no case where a buyer has failed to take the 2% within any reasonable time.

Petitioner's Exhibit 501 was received in evidence.

[fol. 1673] FRED G. TAYLOR recalled.

Direct examination.

By Mr. McGratty:

Paragraph 6 of the Code of Ethics as originally adopted reads:

"The Institute recommends the use by members of uniform contracts to be adopted by the Institute for eastern, southern and western markets."

The Institute has never urged members to adopt any particular form of contract. Two different efforts were made along those lines, one preceding my connection with

the Institute, which Judge Ballou discussed with me, wherein he had collected the contracts of the various refiners and codified them upon a sheet to indicate the terms that were common in all of them, and also to indicate those which had additional or different terms. I reviewed these exhibits with him but he stated that out of this survey and his discussion with the refiners and their counsel individually, he had come to believe that it was a task that would be difficult if not impossible, of accomplishment; and that, after all, the essential features of the various contracts were so similar that it would appear to be unnecessary to strive for an exact uniformity of contract.

Defendants' Exhibit F-8 was received in evidence.

[fol. 1674] The subject of a uniform contract form was next discussed at the meeting of the Executive Committee in August 1930 when Place asked that the matter be reconsidered, feeling that there would be some advantage in working out uniformity at least with respect to certain contract terms. Cummings, who was present at the meeting, stated that it was a perfectly proper activity for the Institute and they might well devote themselves to trying it again. The contracts used by members were subsequently gathered and submitted to counsel in February 1931. Counsel submitted a tentative contract form together with a letter in which he discussed the subject. This was brought to the attention of the February meeting.

Defendants' Exhibit G-8 was received in evidence.

The minutes of the Executive Committee meeting of February 19, 1931 read as follows:

"The Executive Secretary read a letter from Sullivan & Cromwell regarding uniform contracts. The Executive Committee instructed the Institute to send a copy of the letter and the uniform contract to all members without comment and to place the subject of uniform contracts on the agenda for the next directors' meeting."

The meeting was held in San Francisco but the matter [fol. 1675] was not discussed at this meeting because the Department of Justice agreed to delay temporarily the filing of this suit on condition that the existing status of the

Institute be in no way changed. The subject has not been put on the agenda for any subsequent meeting since that date.

[fol. 1676] CHARLES B. CASTLE recalled.

Direct examination.

By Mr. Wyatt:

I have had experience with the refineries of my company. I was at the New York refinery in Long Island City from 1917 to 1924. During that time I did practically all the different clerical jobs in the office.

I am familiar with the practice of National with respect to the packing of sugar under private brands for customers. We packed private brands for several customers. There was a stock of various private brand bags at the refinery month after month which were not being used at all. We would count the stock each month and the same quantity of private containers would be there. To get rid of them, we eventually sold the containers as secondhand bags for what we could get. During the period from 1917 to 1928 we did not pack more than 2 or 3 private brands. We supplied the containers in which the sugar was packed under the private brands. Private brands are limited to bulk bags and, in a few cases, some 25s. We did not charge the customer extra for supplying the bags which had to be kept separate from those used for the marketing of our own product. [fol. 1677] When an order was received, the shipping department had to notify the packing department that they had an order for a quantity of these private brand bags and the packing department would get the sugar ready for shipment. They would have the bags brought up from storage to the packing floor. Then they would have to be packed and stored until the full order was ready for shipment. They were stored in a separate place on the shipping floor, apart from our regular brand, so they would not be confused. From 1917 on, the number of private brands, which our company packed, decreased.

We received requests from some customers during that period for the privilege of receiving their sugar in private brands. I do not know of any open announcement to the

trade during the period 1927-1928 extending the privilege of receiving sugar in these private brand containers to all our customers. Prior to 1928, I never heard of any announcement by any other refiner extending to their customers the privilege of receiving sugar under private brands.

There is a greater expense in supplying sugar under private brands than supplying it under our own trade brand because of the extra expense of storing the bags separately, the extra expense incidental to the handling of the empty [fol. 1678] packages prior to their being filled and the extra expense involved in the handling after they are filed prior to the time they are shipped.

Defendants' Exhibits H-8 and I-8 were marked for identification.

In 1928 there was only one private brand on our books, that of John Blaul Sons, of Burlington, Iowa. We discontinued packing that private brand last year because we withdrew from the Iowa territory. We withdrew because we considered the territory was not attractive to us from a cost standpoint.

[fol. 1679] J. HENRY LIENAU recalled.

Direct examination.

By Mr. Wyatt:

Before the formation of the Institute, National had arrangements with its customers in connection with the use of bags supplied by those customers. The number was limited to 2 or 3. The arrangement first began in 1924 with National Biscuit who complained that dust and dirt got into the sugar. They had handled other materials in their own bags and asked us if they would supply us with bags whether we would make an allowance on what we would pay for an ordinary bag. They supplied us with a very strong seamless bag which cost 40¢. An ordinary bag costs 15¢. It was stamped with their name. They would send us those bags, we would fill them with sugar, tie them up with a string and send them back to them. They would send the bags back to us to be refilled. If they got into bad condition, they would repair them or discard the old bags and send us new ones. As the bags came back to our refinery they were

counted and kept separately by our employees. As the orders came in, they were filled and shipped out. We made an allowance of what we would save by not having to buy a bag in which to put this sugar. It was a small deduction on the cost of handling from time to time.

[fol. 1680] We did not offer this privilege of returning bags to all customers because we felt that the thing would not be practical. We would be swamped with our customers' bags and it would be impossible to handle them and to keep them separately in the warehouse. In the days prior to the Institute I never heard of an open announcement by any refiner extending this privilege of using returnable bags to all or any part of his customers.

I am familiar with contracts known to the trade as "tolling contracts." The tolling contract is one under which the customer supplies to the refiner raw sugar and the refiner returns a proportionate amount of refined sugar. The refiner supplies the bags in which the sugar is placed. As a rule the sugars are delivered under the trade name of the refiner. The rate charged by the refiner is determined at the time the contract is made.

When a refiner tolls sugar, he does not give out the exact sugar he received as raw, but takes the refined from his general stock. A person who makes a contract with a refiner does not have to wait until the raw sugar is run through the refining process but may apply immediately for ship-

[fol. 1681] ments against the raw sugar.

National tolled small amounts in 1924 and 1925. Prior to the formation of the Institute, we had offers of cargoes for tolling which we did not accept. It was not our policy to make tolling contracts because we felt we had our own trade to take care of and if we took too many such contracts, we could not take care of our tolls and our customers at the same time. Prior to the Institute, National did not make any open announcements that it would accept tolling contracts. I have never heard of an announcement of this kind being made by other refiners. It would be very difficult for a refiner to make such an announcement to the trade. If he did so and accepted many, it might seriously interfere with the conduct of his own business. Some large buyers and users of sugar have had sugars tolled for them. Raw sugar purchasers have also made arrangements for tolling.

Cross-examination.

By Mr. Rice:

National was approached prior to 1928 by the Loose-Wiles Biscuit Company and a few other purchasers who bought in similar quantities as National Biscuit with the proposition of using their own bags. We gave them some used bags but they did not seem to like them very much and the practice was discontinued.

[fol. 1682] I do not know of any case where National, prior to the Institute, discriminated against a customer who was capable of taking deliveries under similar circumstances as National Biscuit.

[fol. 1683] FRED G. TAYLOR recalled.

Direct examination.

By Mr. Wyatt:

The question of tolling contracts first came to the attention of the Institute in July, 1928, through a report that Savannah had entered into a tolling contract with Coca-Cola and the question was asked whether such an arrangement was not a violation of the provisions of the Code. The question was brought to an Executive Committee meeting and after discussion, it was the expressed opinion of the Committee that it was a violation of the provisions of the Code, both with respect to its fundamental principle of openly announced terms and prices and also with respect to discrimination as it was an arrangement not open to all buyers. The Committee reported this to Pardonner of Savannah. The minutes of the Executive Committee meeting of July 24, 1928, refer to this discussion.

The matter was again discussed at meetings of July 31 and August 2 and an Interpretation was adopted. In the course of the discussion it was reiterated that these were violations of the Code, in that the traditional practice of sugar tolling was subject only to private negotiations between the parties interested, was not publicly announced and was therefore a direct violation of the Code principle [fol. 1684] with regard to open announcements. Secondly,

that because it was not open to all buyers alike, it was necessarily discriminatory. Attention was also called to the fact that if arrangements were made with owners of raw sugar or with buyers who sold their sugar in the open markets, such sugars would not be disposed of under the provisions of the Code of Ethics and therefore the refiners would be contributing to the breaking down of their own purpose in adopting the Code. At that time Code Interpretation I(c) 2 was adopted. There was a further discussion at another meeting regarding a change in the Code Interpretation. At a meeting on December 14, 1928, a resolution covering the same subject and suggested by Babst, was passed by a majority vote.

At the subsequent meeting on January 17, 1929, Spreckels who had not been present at the December meeting registered an objection to the resolution. He stated that he felt that a refiner having tolling contracts should merely see that the refined sugar resulting therefrom was sold under the provisions of the Code. Some discussion was had on this point. Judge Ballou agreed with Spreckels that the purpose of the Institute should be merely to pre- [fol. 1685] vent violations of the Code which would arise if refined sugars reached people not subject to the Code and who might violate the principle of open terms and prices publicly announced. In these discussions we were particularly referring to tolling contracts with raw sugar producers or with those who intended to resell the sugar. Judge Ballou's and Spreckels' views prevailed and the recommendations passed at the former meeting were rescinded. Then a resolution was adopted which provided that the refiner who made a tolling contract should keep control of the sale of the sugar in order to insure its being sold under open announcement. The resolution reads:

"Resolved, that a refiner should not enter into a tolling arrangement under which he does not retain entire control of the sale of his product, in order that it may be sold in accordance with the Code of Ethics."

That represents the last action taken by the Institute in connection with the subject of tolling contracts.

Tolling contracts have been made since the formation of the Institute. The Imperial Sugar Company reported that it had entered into a tolling arrangement with the Garcia

Company, producers of either foreign or insular raws. Exhibit J-8 is the report to which I refer.

Defendants' Exhibit J-8 was received in evidence.

[fol. 1686] The Institute did nothing about that report.

Cross-examination.

By Mr. Fly:

The resolution passed in July provided that sales to manufacturers or other buyers or users of sugar, where obtained at a price other than the price announced from time to time by refiners, were discriminatory. Under this we construed as discriminating any and all tolling for any kind of sugar merchant in that it was not open to all purchasers alike. Apparently we opposed tolling for any customer of the refiner who intended to resell if it was not to be openly announced. We did not specifically oppose it in all cases where the proposition was on behalf of a merchant or other concern that was selling sugar in the country. I mentioned that the refiners in their discussions pointed out that while selling to the manufacturer might violate the principle of the Code regarding open terms and prices publicly announced, the other service rendered to sellers of sugar would have the effect of taking the refiners' production into the market to agencies which were not under obligation to any code of ethics and therefore they would be indirectly breaking down the things that they had directly sought to accomplish. It was our theory that we should not only see that there were open prices and [fol. 1687] terms as regards the refiners' own arrangement with a customer but we went further and objected to the sale on the ground that the customer himself would dispose of sugar at other than open prices. It was our purpose as far as we could exercise the proper influence to bring it about that every pound of sugar should be sold only at these open prices and without discrimination.

Under the latter resolution, tolling arrangements were permitted only on condition that the refined sugar resulting from such arrangement should be sold under the provisions of the Code of Ethics.

We did not object when Imperial had not made an open announcement of its intention to toll because they made a

report that they had placed the Garcia Company under obligation to dispose of the sugar under the Code of Ethics. That is as far as our interest went. We were not interested in that case in the initial arrangement between the refiner and the concern receiving the tolled sugars because it seemed to conform to the provisions of the December Interpretation.

We objected to Coca-Cola's arrangement simply because the terms had not been publicly announced. We did not object to the one with Garcia on the same grounds because the assumption was that he was offering the sugar in the [fol. 1688] open market and that Imperial was seeing that it was sold in conformity with the provisions of the Code.

[fol. 1689] MARK W. LOWE was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Browning:

I have been manager of Pennsylvania Sugar Company since 1929. Our company has reported weekly, certain statistics to the Institute.

The classes of statistics are: the number of hours and days the plant has operated; quantity of raw sugar melted; total stocks of refined on hand at refinery; total stocks of sugar on consignment; total stocks of sugar in transit; total deliveries from refinery; total deliveries from consignment; total deliveries by states both from the refinery and consignment; refined sugar on consignment by states; sugar stored in transit; sugar moved by differential routes for the refiner's own account; sugar moved by differential routes at customer's request and sugar moving by private charter. We report deliveries of damaged sugars or frozen stocks as the sales are made.

We reported the melt by weeks for the years 1925, 1926 and 1927, the total weekly stocks of sugar in 1927 and the monthly deliveries of sugars by states for 1927.

[fols 1690] Defendants' Exhibits K-8 to N-8, inclusive, were received in evidence.

Defendants' Exhibits O, P and Q-8 were received in evidence.

[fol. 1691] PEDRO P. POLAKOFF was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Browning;

I am assistant to the treasurer of Pennsylvania Sugar Company and have held the position since 1915. I am in charge of all accounting details, the compiling of statistical figures when necessary and financial reports.

Defendants' Exhibit R-8 was received in evidence.

In obtaining our figures for raws in Exhibit S-8 we did not deduct the loss of approximately 7 pounds of raw sugar from each 100 pounds of raw refined. We obtained the refined figures from the actual billings of the customer less freight absorption. We reduced that sugar to a granulated basis. We divided the total amount received for refined, less freight absorptions by the total number of pounds of refined.

Defendants' Exhibit S-8 was received in evidence.

The freight absorption figures on Exhibit S-8 represent the net loss on freight. The figures were obtained by charg-
[fol. 1692] ing the freight account with freight paid on shipments made. Then we credited the freight billing value to the customer and the net difference between the two is the freight absorption.

Defendants' Exhibit T-8 was received in evidence and Exhibit U-8 was marked for identification.

Referring to Exhibit U-8, the real estate, plant and equipment and net working capital which make the total set forth in the third line of the first sheet of the summarized balance sheets are all assets used in refining. The assets in the next line entitled "Other Assets" are not assets used for refining. The assets included in the total capital employed for refining are valued as follows: fixed assets at cost and current assets at market or cost, whichever is lower. These are our book figures.

[fol. 1693] WILLIAM EDWARD FOSTER was called as a witness on behalf of defendants.

Direct examination.

By Mr. Higgins:

I am vice-chairman of the Board of Directors of American Sugar Refining Company and have been connected with the company since its organization in 1891. I was treasurer from 1913 to 1920, vice-president from 1920 to 1925, president from 1925 to June 12, 1929, and since that time vice-chairman of the Board.

In 1927 the whole sugar refining industry was very much demoralized. Many of the companies, including ourselves, were giving secret concessions and allowances from their openly announced prices and secret terms to specially favored customers. This brought about a very unsatisfactory condition in the industry. Anybody getting a concession even of small magnitude was in a favored position regarding his competitor and could sell cheaper than the other man and this created a great deal of dissatisfaction.

Many demands were made upon us by buyers for concessions because they claimed they could get them from their competitors. We had no accurate information. We could not get any such real information. We realized that giving concessions might be considered illegal under the Clayton [fol. 1694] Act. We were very much worried about it. Nevertheless, we did not see how we could retain business if we did not meet what other people were doing or were supposed to be doing. That condition did not first arise in 1927. Concessions had been creeping into the trade way back in 1921. At that time I was called into conference with Babst, then president of the company, and he stated that our sales department was constantly complaining to him that we were losing trade or were liable to lose trade because we could not meet some things that were being done. We called in Crews, who was at that time our general counsel, and had several conferences as to what should be done. Crews said that, in his judgment, under the Clayton Act we could meet competition of that kind provided it was met in good faith. Babst laid down the policy that our sales department could meet these competitive conditions but

that we must consult the legal department so that it could be convinced that we were acting in good faith.

We took up each case individually since we had no general policy of giving concessions and did not initiate them. [fol. 1695] Our policy was enforced when I became president in 1925 and was continued. I never went into details of what was going on, but it continued and was growing in volume from year to year. That was one of the things that disturbed us very much but we could not see anything to do, if we wanted to retain our volume of trade, but to meet these conditions.

There was no such accurate statistical information with respect to melts, stocks on hand or deliveries prior to the Institute. I believe we were the only company who attempted to gather sueh in formation. We tried to but there were no accurate statistics. Some were published by some of the people like Willett & Gray. They certainly were not accurate as to deliveries and not as to melting, so far as we knew.

We got information as to different refiners' melts by keeping track of the custom house entries and the arrival of vessels. We also talked with different brokers as to sales and made up the best kind of picture we could. We did not have any actual figures as to other refiners' stocks, either at the refineries or in consignment. We did not have any information at all as to other refiners' deliveries by markets, rail, barge or differential routes.

[fol. 1696] I attended most of the preliminary meetings in the summer and early fall of 1927 relative to the proposed formation of the Institute. The men who attended the meetings were generally Babst, Post, Spreckels, Rionda, Lowry and Cummings. At the meetings prior to December 1927 we discussed quite freely what we considered the evils existing in the industry, the existence of these allowances and concessions and special terms. We drew up a list, each one contributing what he knew, and discussed them to some extent. We also discussed the question of lack of statistics.

There were 6 or 8 meetings prior to December. They started in the spring and lasted through the summer until sometime in August. I attended all meetings which took place beginning December 12, 1927, and continued during that month. At the preliminary meetings some represen-

tative from each of the 15 refiners were present. Every refinery had its president or executive officer in attendance. At the December meetings the types of concessions were generally discussed and those who were giving them made no secret of what they were doing. We discussed methods and ways we thought might improve the industry. Revere, [fol. 1697] Arbuckle, C. & H., Western and Henderson stated they were not giving concessions. We made up a list of the more prevalent concessions and it was sent out to the different refiners when we asked them to attend these December meetings, telling them they would be matters that would be discussed. At the December meetings we drew up a Code to do away with them, naming most of the types of concessions and finally bringing out a platform of openly announced prices and terms and the same treatment to all customers.

At the December meetings a Statistical Committee of which I was chairman was appointed and we brought in a report calling in the first place for submission of weekly meltings and stocks.

American was giving allowances which were concessions off our openly announced prices. They might run 5¢ per 100 pounds and in some cases went as high as 10¢. At a later period we sent these buyers a check covering the *amount of the allowance. It never appeared on the face of* the contract.

The agreement was an oral understanding made contemporaneously with the execution of the contract. It was a matter between the broker and our sales department or [fol. 1698] the buyer and our sales department.

The usual method was for the understanding to apply on all subsequent contracts until some definite understanding was made. These allowances were all secret and we did not allow other customers to know the allowance which was being made, if we could help it.

The sales department would report that certain customers demanded allowances and we met them in order to secure their business.

Other secret concessions were permitted to special buyers direct. We gave special terms, such as options to buyers and allotments to brokers. In order to enable brokers to give concessions and obtain additional business we allotted to them after a rise in the market, a certain number of bags at the old price. We winked at the extension of

time in paying in connection with the 2% 7-day discount and we allowed delayed billing to a considerable extent.

In some cases concessions were by way of allowances. [fol. 1699] We permitted substitution of grades, particularly in soft sugars. They were not extended to all customers alike. The allowances were not based upon quantity purchased.

I am frank to say that the big buyer always stood a better chance of getting an allowance than the little fellow, but it was not regulated by the volume of business he gave us.

Some small customers got practically the same allowances per bag as some big customers. It is largely a matter of insistence, governed by the fact that we would give an allowance even for a small quantity in the hope of getting larger sales.

We joined the Institute because we felt the platform of openly announced prices and the same treatment to all was the only solution of the evils in the industry. We believed in that policy. We believed that it would instill more confidence in the trade between the refiners, would tend to stabilize the industry and, I am frank to say, we expected to make more money. We also, as I have announced before, were cranks on this question of statistics. I could not see how any industry could operate successfully without knowing what was going on. We were always moving around in the dark and we thoroughly believed, if the industry itself knew what was going on in the way of meltings and deliveries and had some knowledge of stocks, that we should [fol. 1700] have guide posts to enable us to carry on our business better.

Information regarding deliveries would be useful to us since we did not know whether we were getting what we considered a proper percentage of the business. We did not know the stock in various points. We knew that information would be a practical benefit to us in our melting programs and of course later on, when we got actual deliveries by stations, we knew where we were losing and had real grounds to work on in order to secure business.

In the days before the Institute we frequently found we had melted more goods than we could sell and had greater stock in various places than we could dispose of. It was a matter of working in the dark. Without this statistical information we did not have any means of determining in

1927 the substantial decrease in the consumption of sugar which developed in that year as compared with 1926 and preceding years until after the end of the year when, for the first time, we had the statistics furnished by Willett & Gray and other such statisticians.

The general effect on sugar trade and sugar sales conditions, melts, etc., of the reduction in consumption in 1927 [fol. 1701] as compared with 1926 was that we did not make as much money. When we found in 1927 that we melted more goods and shipped more goods into certain markets than we could dispose of, we were a little more careful as to what we did in 1928. The over-accumulation of stocks and reduction in consummation began to make itself manifest in the price trend after the middle of the year. In the early fall there was special pressure to increase sales. This was particularly so in the case of the Pacific Coast refiners. C. & H. entered into a very vigorous campaign and gave a special open allowance. There was increased competition by the beet companies, who saw from the plantings that there was going to be a greatly increased production for them to dispose of in 1928 and they also were aggressive sellers. That meant, so far as the rest of us were concerned, that we did not sell as much and in order to effect sales there was an increase in concessions and special allowances.

In the conduct of business of American during the years when I was vice-president and president and since chairman of the Board, I have been one of the officials who [fol. 1702] actively participated in determining price policy and price change. Since the Institute there has not been any understanding or promise on the part of American with any other refiner or refiners about its price policy, price changes, price advances or declines. I did not promise any other refiner that I would advance a price if he did, maintain a price if he did or not decline if he did or did not. I have never given any refiner any assurance in any way, express or implied, that I did any of these things. No other refiner has ever given me any assurance, express or implied, that he would advance, maintain, decline or not decline a price.

I have not had discussions with any of the refiners in advance of our price movements as to whether he or American would or would not advance, decline or maintain a

price. I have no information that any other refiners or representatives of American have participated in such agreements, discussions, assurances or promises and I do not believe they ever did. I have never discussed with other people either prices or agreements on prices.

At the organization meetings prior to the Institute, either [fol. 1703] before or during December 1927, there was no discussion or suggestion of price policies or any agreement to maintain prices or to advance prices. Cummings informed us at the beginning that it was one of the things we could not discuss and could not agree upon any more than we could agree to divide territory. Those things were taboo and have always been so.

The executives, officers or employees of the Institute have never discussed with me or to my knowledge with any of the other refiners, the matter of division of territory or allotment of sales or price maintenance. Matters of price maintenance or price advances or price declines were never discussed at any of the Institute meetings or other meetings of the refiners that I know about.

The factors which determined American's price policy before and since the Institute are: the price of raw sugar, what our competitors would do or did do, our inventory position and our position as far as orders were concerned. When it came toward the end of the 30-day contract period, unless there was some radical change in the raw sugar [fol. 1704] price, we considered the matter of changing our price or trying to do something to secure additional business. The season always had a bearing. Sugar moves more freely in the summer months. There was also the "buyers' psychology" which is always a factor. One can sell goods more readily by advancing than declining the price. There has been no change since the Institute in the factors that have determined American's price changes.

Since we went into the package business extensively, we have done a large amount of advertising. We have not been able to build up our Domino Brand so as to enable us to sell it for more than our competitor's sugars. We do not receive any increased price, but we think sometimes we obtain a preference. We have created a demand and people have to supply that demand. Outside of a few specialties, sugar is standard and the same price prevails for all. One refiner cannot get a higher price than the other. If a

man lowers his price, except for a limited time, that price has to be met. Before the Institute there were times when Arbuckle and Federal sold at lower prices than we did. [fol. 1705] Since then I think we have always met their price. They have sometimes had a lower announced price but sold no sugar. When there was actual business their price was met. Before the Institute, Arbuckle and Federal sold at lower prices. We did not always meet their competition although when it hurt us in any way we did. For a limited time we could always meet what they were doing by reason of our specials. Arbuckle and Spreckels for a limited time had announced a lower price that was not met but I do not think they did very much business.

There would be times when we would have an announced price but there would be no business. Arbuckle had occasionally, perhaps since the Institute started, what they called one of their "bargain days" when they would offer sugar for 24 hours at a lower price. There was one occasion when we did not meet it and we were sorry afterwards. It developed from reports of our sales people that they scooped in quite a lot of business. I don't think that happened since.

When sales are made on the 30-day period there is very little new business until the end of that period; most all the trade has bought, and the day-to-day business is very lim- [fol. 1706] ited. At times we did not sell 100 bags a day. We should have been selling from 60,000 to 100,000 bags a day.

The secret concessions or allowances before the Institute were allowances off our selling price, not our list price. We frequently carried a higher list price than a selling price. Sometimes we had a different list price and different selling price in different territory. I believe that arose from the fact that in guaranteed territory we guaranteed our list price only and I suspect that we held out that list in order that we would not have to pay a guaranty in case we had a lower selling price.

When our list price was 10 or 20¢ more than our selling price, we announced our selling price to our brokers and the other refiners because we never made any secret of what our real selling price was. The selling price was not the actual price where we gave the secret rebate. The secret rebate would come off that. When our list price and our

selling price differed a written contract was made at the selling price.

I never discussed with any of my competitors in advance of American's announcement of delivered prices, our proposal to announce such prices. I have never handled and [fol. 1707] know nothing about transportation and freight questions.

I had no advance information at all as to delivered prices at canal and lake ports in April, 1929. I was in the South at the time and the matter had not been discussed with me before I went away. I know of no discussion at any Institute meeting as to what the delivered prices were to be or in detail what the nature of the system was to be.

I recall that at one time there was some discussion as to whether we could sell on the same basis as the beet people sold, which I believe was a form of delivered price. Someone suggested it might not be legal and it was referred to our counsel. I do not know what became of it. I never heard the decision. At another time there was some kind of zoning system talked of. As far as I know it was never adopted. I have no recollection of any action of the Institute looking toward the installation or recommendation of either the delivered price system or the zoning system.

I do not recognize the particular papers marked Exhibits 385 and 385-A to L, inclusive. I assume these are the que- [fol. 1708] ries that were put up to me in the early days of the Institute by White or some of his assistants. At that time I told White it was our purpose to live up to the ethics of the Institute and if he had any questions as to what should or should not be done he should bring it to me and I would give him the decision as to what he should do. He brought questions to me and I told him what he should do. At times he brought typewritten queries which, as a rule, I did not read but when he asked me the question I told him offhand what to do. If there was anything I had any doubt about, as to whether it was according to the spirit of the Institute or if I wanted to investigate, I laid it over. He may have left the document with me, I don't remember. I think very likely I told him to bring them back at a subsequent time. When these documents were presented to me by White and his assistants I did not take them all up with the Institute. I only took up with the Institute or other people questions

I wanted to discuss with them or with somebody else. The majority I answered immediately.

At the time Exhibits 385 and 385-A, dated January 12, 1928, and Exhibits 385-B, C and D, dated January 13, were [fol. 1709] taken up with me, the Institute was just organized. There was no executive secretary and we had no permanent headquarters. We didn't get organized until February, at which time Judge Ballou became executive secretary. Our first directors' meeting was February 7 and he was in attendance.

The instructions under the heading "Institute Ruling" at the bottom of Exhibits 385 and 385-A to I, inclusive, were instructions I gave to my subordinates. I haven't the slightest idea why they happened to be called "Institute Ruling" except White put that thing down as covering what would be the attitude of the Institute. I certainly did not tell him they were Institute rulings, because some of them had never been passed on by the Institute. They were matters of policy before we had the Institute and they continued right along. Regarding some of these questions I would either talk to Judge Ballou or somebody and bring it up to the Institute. On one or two occasions I remember distinctly I would bring it up and there was a general concensus of opinion of what would be the right interpretation of the Code and I would advise White and tell him what to do.

Cross-examination.

By Mr. Fly:

The difference in our selling prices under the Institute [fol. 1710] was largely a matter of competition particularly in the South where most of these differences existed. I considered the Middle West and South in the same position so far as competitive territory was concerned. We usually sold at about the same price as Revere in New England. Concessions did not exist to any extent in New England at any time. I do not suppose there would be much difference in New England between list and selling price.

Not all our contracts bore prices equivalent to our regular selling price because there were some contracts like

Coca-Cola and special long-term contracts. In the general run of business our contracts consistently showed on their face the regular selling price but there were exceptions. It was an exceptional thing for concessions to show on the face of the contract. Ordinarily all of our contracts bore our actual selling price at that time. I have not made an examination of any contracts to enable me to testify whether the concessions appeared on the face of the contracts. I am only testifying to my recollection of the method of business. I never went into any details of that kind at all. The only thing I went into was the general policy of the company. I went into merchandising problems no more than I did into transportation.

I think that the estimate I made of the over capacity of the sugar industry showed in 1927 an increase of 40% over 1917. That means a capacity melting for 300 days in the year would produce so much. Sometimes in that period there is very little excess capacity. In the summertime [fol. 1711] some refiners have to run 80 to 90% in order to get out their goods.

In the whole industry we generally speak of about 50% over capacity. There was no over capacity during the war period.

Redirect examination.

By Mr. Higgins:

I imagine that before the Institute we gave the same customer more than one type of concession. Carpenter, in our legal department, passed on the question of whether the circumstances in a given case justified the giving of more than one type of a concession to a customer.

One can sell more sugar than he can produce at times. By the 50% excess capacity I mean that if it had been possible to run plants at the off peak times at full capacity for each of the week days, that is 300 working days in a year, the plants so operated at full capacity might have produced 50% more sugar than could have been used but I do not know what could have been done with the sugar.

Cross-examination.

By Mr. Fly:

In order to meet the requirements of the country in certain periods of the year we must practically operate the industry at full capacity during that period.

[fol. 1712] Redirect examination.

By Mr. Higgins:

American has not given any concession, rebates, allowances or other secret arrangements since the organization of the Institute. At the time the Institute was organized we made an announcement that all allowances and concessions were withdrawn and no more would be given. We followed that out with instructions to our operating organization. So far as I know and have any reason to believe, I believe these instructions were carried out.

[fol. 1713] MARTIN E. GOETZINGER recalled.

Direct examination.

By Mr. McGratty:

The type of contract in use at the time of the formation of the Institute was a 30-day contract under which the buyer had 30 days in which to take deliveries. We refiners heard of exceptions occasionally. On the Pacific Coast we understood there was a 21-day contract and that the 2 Pacific Coast refiners granted a much longer term to the canners and fruit packers. Arbuckle did not offer longer term contracts to all their customers or to any particular class of customers, whether manufacturers, canners or jobbers. We had but one standard form which we offered, a 30-day contract. I have never heard of any other refiners openly announcing a special kind of long term contract, either to the trade at large or to a special class made up of manufacturers, canners or jobbers.

At the organization meetings of the Institute in December 1927 there were discussions of long term contracts in connection with the fundamental principle of the Code that

sugar should be sold on open prices and terms publicly announced, without discrimination among customers. We had not got very far along in considering a draft of the [fol. 1714] Code of Ethics when one of the refiners announced he had a contract that had 2 years to run, that it was a legal contract and that he was bound to fill it and that it would be contrary to the openly announced prices proposed as the first section of the Code. Other refiners stated that they had special long term contracts with concessions but they were all of a minor character except this one.

The long term contract was the Godchaux contract for delivery to a buyer in Detroit. Revere stated that they had certain special order contracts which they would feel obligated to fulfill until they had withdrawn that type of contract. American announced they had a contract that had to run until 1928. Henderson had a minor contract of that sort. Pennsylvania had some sort of contract. The point was that if we adopted the proposed Code those refiners who were bound to fulfill their contracts could not become members of the Institute because they were bound to fulfill them at terms other than openly announced prices and terms. It was proposed that Cummings, as counsel, and a committee should present a final draft of the Code to the Attorney General in Washington and some refiner with a head on his shoulders said that while that committee was [fol. 1715] down there no one should go out and fill his pockets with this same kind of contract.

I left the meeting with the idea I would have turned a dirty business trick if I had gone out and taken such contracts. Before we left the meeting, Cummings advised us, from the legal side, that he was going to present this Code and argue for the whole Institute the notion of selling terms openly announced and if it should appear that at the very moment he was in the Attorney General's office making that argument, we had deliberately gone out and taken contracts to defeat the Code, that would be most unfortunate. It was requested that the members present should check their records and send in their reports on the several types of contracts outstanding which they would have to fulfill despite the provisions of the Code. It was the understanding that all outstanding special contracts should be sent in to the Institute.

During 1928 the members discussed on several occasions the question of whether a special type of long term contract for manufacturers could be worked out which would not be discriminatory against other buyers to whom such contracts were not offered.

[fol. 1716] (Defendants' counsel referred to Exhibit 428, the minutes of the Executive Committee meeting of January 24, 1928 and the minutes of the Directors' meeting of February 7, 1928.)

At the meeting of January 24 we started favorably considering a contract with the thought of rendering manufacturers a service by giving them a longer contract. Two problems quickly arose, first, whether or not we could adopt a scheme that would not be discriminatory to certain buyers or a certain class of buyers, next, assuming we could overcome that point, what would be the terms of such a contract that would be fair both to the buyer and the refiner. We first considered the question of whether or not we could work out a special kind of long term contract for manufacturers only.

We decided that it was possible but we could not hit upon a scheme that seemed satisfactory to the buyers. It seemed to us that there were three ways in which the refinery could proceed: First, to take a contract running for a long term, buy the raw sugar, refine it and store it in a warehouse until needed and charge the buyer for the carrying expense. That did not appeal to the buyer because he could have done that himself. He could have taken delivery of the sugar immediately and carried it in his own warehouse for less than the refiner could carry it for him. Then [fol. 1717] came the thought that the refiner might not take any step at all to protect himself on the price but simply gamble that he could buy raw sugar at a price equal to or lower than the price prevailing on the date the contract was made. The refiners were unwilling to take that chance. There was also a theoretical suggestion that the refiner might cover this gamble by hedging operations on the Sugar Exchange. We did not go far with that. Personally I don't believe the refiner can cover himself by a hedge. I was opposed to it from the beginning. Moreover, if a contract was worked out on a hedging basis, the buyer would not know what the price was until the refiner

had actually covered himself by a hedge on the Exchange.

The different contracts entered into with different buyers would be at prices necessarily in accord with the fluctuation of the future prices on the Exchange so that each contract with each buyer would be entered into at a different price on a different basis. It would be impossible to have any system of open prices if we went into hedging on a large scale with all buyers.

I never considered the recommendation of February 7, [fol. 1718] 1928, binding upon me in the sense that I would not have felt free to decide upon a change by Arbuckle as to openly announced long term contracts, available to all buyers, which I felt would not be discriminatory. There were 2 or 3 further discussions of this problem after the recommendation of February 7. A letter (Exhibit 418-C) was received from some manufacturer and the question of whether we could work out and offer special types of contracts to manufacturers only, without discrimination to other buyers to whom such contracts were not offered, was referred to counsel for legal opinion.

Defendants' Exhibit V-8 was received in evidence.

The recommendation with respect to a special type of long term contract for manufacturers referred to in the minutes of the Directors' meeting of November 15, 1928 was not followed by the members of the Institute. The manufacturing trade apparently was not interested in paying the carrying charges contemplated. They desired that the refiner should bear the cost of carrying their stock for them until they needed the sugar.

Arbuckle has not offered long term contracts to all its [fol. 1719] buyers or any particular class of its buyers during the past few years. After making all these efforts to agree upon a form we have not originated one of our own that we thought was an improvement on the one that was not received with favor by the trade. Arbuckle never made the statement to any other refiner that we would not openly offer a long term contract if we decided to change our policy. We did not request that assurance from any refiner. We have had no discussion since the proposal in 1928 with any refiner members of the Institute in connection with long term contracts. I recall one meeting where the desirability of offering a 21-day rather than a 30-day

contract was discussed but it was not received with favor. Thirty had been standard for a great many years and I saw no reason why we should go to 21.

Defendants' Exhibits W-8 and X-8 were received in evidence.

Cross-examination.

By Mr. Fly:

At the organization meetings, Worcester did state whether or not he thought several special contracts were in accordance with the Code. I do not recall that he characterized them particularly, except that one or two other [fol. 1720] refiners mentioned having contracts that would be contrary to the proposed section of the Code and Worcester announced his. I considered these contracts discriminatory. I know of no contract for more than 30 days made by any refiner in the East since the formation of the Institute with the exception of export contracts and contracts offered to manufacturers and canners on the Pacific Coast.

[fol. 1721] Testimony by Mr. Fisher:

The loose-leaf book of Code Interpretations was first out in 1930 and contained only the things which were current at the end of 1931. In order to have a complete record for the purpose of this suit, everything that had been in and taken out we had printed and inserted in this loose-leaf book copies of the original pamphlet Interpretations. The loose-leaf printing of 1931 contains the historical sheets with the earlier and superseding recommendations and Interpretations and was not circulated to the refiners. They were only sent to Sullivan & Cromwell. The loose-leaf book of Code Interpretations subsequently adopted was sent to the refiners. Nothing contained in the loose-leaf volume that is dated prior to May 1, 1930, was sent to the refiners. All material dated prior to May, 1930, is merely of historic interest and has been reprinted in this volume solely for convenience in this suit.

[fol. 1722] MARTIN E. GOETZINGER recalled.

Direct examination.

By Mr. Wyatt:

Defendants' Exhibit Z-8 was received in evidence.

I was present at the meeting of the Institute at which the question of allowances on used bags was discussed. I am familiar with the fact that the Institute has recommended the practice of making such allowances be discouraged. My first connection with the question of used bags was when a customer requested Arbuckle to allow him 20¢ a bag at a time when the new bag was costing us 12½¢ and I refused to do that. When the subject of used bags came up at the Institute I said that the whole returned bag business was simply a subterfuge for giving a secret allowance, that is, crediting a larger value for the bag than it actually had. No one admitted that he had been guilty of the practice which I indicated. We discussed the general merits of the case, what could be done about it, the difficulties of receiving the bags from one or two customers, to say nothing of a great number, packing them in the refinery, filling them especially for a customer when he ordered out some sugar, [fol. 1723] keeping them clean and the unsanitary nature of the proceeding. Following this discussion the recommendation was made that these allowances be discontinued.

[fol. 1724] WALTER C. PITNER was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am a food broker and handle sugar. I have represented American at Athens, Georgia, since 1914. American stored sugar with me until the middle of 1929 when they discontinued storing with brokers. When they did store with me, it was my practice in reporting withdrawals by customers from consignment to hold up the reports a week or ten days, according to market conditions. If the market was strong, I did not hold them. If the market was weak I gave

the customers the sugar and turned in the report as of a later date when the price was down. I did this on account of competition. It was my information that Savannah brokers did the same thing.

I diverted to customers cars which were consigned to my warehouse. That was the general practice not only for me but for Savannah. The refiner sent the sugar to me. I diverted it to the customer, charging storage nevertheless, and reported the sale later on, instead of the time the sugar was sent to the customer. The sugar did not actually go through my warehouse. It was supposed to be there but the refiner did not know any better.

[fol. 1725] The auditors of the American visited me 2 or 3 times a year to check my stock. I would have a little advance notice of their coming. I would get all my D from Cs and get them right up to date. When the auditor arrived everything was O. K.

Cross-examination.

By Mr. Fly:

I have leased different warehouses from time to time. When I quit storing sugar my warehouse could store of 8 or 10 different commodities. I carried various stocks in my warehouse on consignment, just as I formerly did with sugar. I would not call the manner of making the report on the withdrawal of these other commodities "dishonest." It is just a matter of meeting conditions to get business from customers. Customers should have paid the price that prevailed on the day of delivery. I was supposed to report sales daily or every other day. The only reports that I made were weekly reports. The refiners did not know anything about it. We could make these deliveries and hold up billing on them.

I cannot state whether there were any car diversions in 1928 or 1929 or not without looking up the records. I cannot tell you when I don't know. I wasn't keeping the records. Diverting was not a very common occurrence. I do not want to testify that there was any such transaction in 1927, 1928 or 1929. It may be that we did not divert a solid car during 1926. I would have to take it up with my old secretary to get her to look at the records. At any time that I made a diversion of this sort I did not make a false or inaccurate report to the refiners.

Redirect examination.

By Mr. Peck:

I did not tell the refiners anything regarding the diversion of cars for customers.

[fol. 1726] HUGH DAWSON was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am a food producer and head of the Tampa Brokerage Company located at Tampa, Florida. I have represented American for the past 25 years. Prior to the middle of 1929 I warehoused sugar for them. My general practice in respect to reporting withdrawals by customers from the warehouse is to hold up deliveries when the market is showing weakness and report them at later dates after the market drops.

Sugar arrives at Tampa by boat and is unloaded at the pier and at the pier we have switch movements for carload lots and trucking for less than carload lots. The frequent practice, where sugar was switched or trucked to customers, without going through my warehouse, was to make deliveries and then follow with the billing at a later date. None of that sugar went through my warehouse. I billed the refiner for storage on sugar that did not go through my warehouse. The D from Cs which I sent into the refiner were for deliveries from my consignment stock.

Cross-examination.

By Mr. Rice:

When I issued a D from C I dated it. The date meant [fol. 1727] that that was the time we sent in the bill. It did not mean the date that the goods were actually delivered if we had held up the billing. When the refiner received the report it would mean to him that I had delivered the sugar on the day named if he did not know anything else about it. If I actually made delivery when sugar was 5¢

and the day I dated the D from C it had dropped to 4.80, the refiner was interested in the 20¢, not the date. If he did not know the facts, he would be deceived. Custom forced us to do that if we were going to get any sugar business. We either had to keep out of the sugar business or do that sort of thing. I started delaying reports to American the day I got the account. I was engaged in the same practice prior to the time when I worked as a sub-broker under Southgate who was representing National. When Southgate started consignments he showed me how to handle it. This was between 1918 and 1920. I do not know whether the refiners knew of these practices. I delayed the reports when it was to my advantage and the market conditions warranted it. It did not happen regularly.

[fol. 1728] Joe E. Carter was called as a witness on behalf of defendants.

Direct examination.

By Mr. Peck:

I am a sugar broker located at Jamesville, Georgia. I have American's account and have represented them for 10 years. Prior to the middle of 1929 we stored their sugar. It was our practice, in reporting withdrawals, to give the customer the benefit of the market, whether it was going up or down. I did so by holding up our D from C's. If I made a delivery of sugar to my jobber, I would hold up the report, and, if the market advanced, I would date back my D from C and give him the benefit of the lower market. If it declined I would do vice versa.

It is my general practice to divert cars coming from my stock to jobber. The practice started around 1922 and got worse and worse until we stopped carrying sugar. I would let customers take sugar and sell it. If the market went up I would take this sugar in stock and bill it to them at the lower price. If it declined, I would date it the date of the decline and give them the benefit of that also. I would also bill it in small lots. In this way it would not indicate that it was all delivered to one man. I changed the stock num-
[fol. 1729] ber and lot number. I billed the refiner for storage on those cares.

The auditors of American visited me. When they arrived I got busy and billed up all the sugar and showed a lot of surprise at such big deliveries at that time. I did not tell the auditors anything about the sugar I was billing out and they did not say anything about it. They would have had to call me a liar if they doubted my word. I would make it out delivered that day.

Cross-examination.

By Mr. Fly:

The auditors did not express surprise when there were such extraordinary heavy billings because there were days when all the billings were large. The auditors came only about twice a year. There have been times when I had to do some quick billing. There was an extraordinary amount of it at the particular time when the auditors came. When there was a very decisive change in price, I would have quite a bunching of my D from C's. If the market were advancing I would date those 3 or 4 days back, just as if the warehouse or office had failed to send them in the day they were delivered. That was the method in case of an advance. We never received any complaints from the re- [fol. 1730] finers about these practices.

I did not treat my customers alike in the matter of reporting withdrawals. I had 2 or 3 real good customers and took care of them. I didn't mind putting in jobber's stock and holding up billing. In 1928 and 1929, I believed that I was deceiving the refiner. I did not think they knew a thing in the world about it.

[fol. 1731] OPHEL W. YATES was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I have been associated with the William L. Andrews Company of Roanoke, Virginia, since August, 1926. They are general food brokers and have represented American ever since I have been associated with them. In 1926 we were

storing sugar and continued to do so until the spring of 1928. On a rising market, it was our practice to hold up billing until the market declined. We did not hold up the reports for over a week. I did not tell anybody connected with the refiner that I was holding up billing.

Cross-examination.

By Mr. Rice:

We stopped storing sugar in 1928 because Roanoke was withdrawn as a consignment point. Only two points, Richmond and Norfolk, were left in the State of Virginia. I did not start the practice of withholding billing. It was going on when I went with the company. It was a general practice in the trade. American knew nothing about it as far as I know and never complained to us about the practice.

[fol. 1732] Walter L. Lefew was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am a food broker located at Richmond, Virginia. The name of my Company is W. W. Lefew's Sons. I have represented the American since 1922, and from that time until the middle of 1929 stored sugar for them. During those years it was my practice to report daily withdrawals made by customers from our consigned stock, but I had some isolated cases where I was forced to defer or delay the reporting. I had two or three customers who had always given us all their sugar business and they finally told me I would either have to defer these billings, or in one instance consign sugar to their warehouse, or otherwise they would have to change their source of supply. I complied with their wishes.

Some sugar was consigned to me and I diverted it to the customer while it was in transit. I would report withdrawals on that after he had used it. This customer was a large chain store and the car lasted a week. Sometimes there had been no change in the market when I reported it and

[fol. 1733] the market was the same price on the day I reported it as the day I diverted it. On occasions there was a different price. I billed the refiner for storage on that sugar.

Auditors visited us probably once a year. At that time we usually made our regular warehouse delivery book appear as if the sugar had been delivered on that day, and the D from C was made out on the same day as it appeared on the delivery ticket. I did not tell the auditors, or anyone connected with American, that I was holding up deliveries or diverting cars. I told White these conditions existed in our market, that sugars were being consigned to buyers' warehouses, deliveries were being made and billings delayed by other brokers and asked him if we could do the same thing. He said we could not. There were three customers for whom we delayed billings. It was done on rare occasions. It was not a general practice. We had 12 or 15 other customers.

Cross-examination.

By Mr. Fly:

These three customers were our largest customers and had good credit. These practices were discontinued after the formation of the Institute. I do not know that American ever learned of these practices.

[fol. 1734] R. Fleming Johnson was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am a food broker. My firm, Roan & Company, is located at Macon, Georgia. We represent Savannah, and have done so since 1919. Until the middle of 1926, we stored their sugar in our warehouse.

Our practice in reporting withdrawals to the refinery, which were made from our consigned stocks by customers, was to withhold the billings after we had delivered the sugar. We withheld the billings possibly 10 days to two

weeks, giving the buyer the benefit of any decline between the time when the sugar was actually delivered and when it was reported.

Cross-examination.

By Mr. Fly:

The D from Cs on our sugar withdrawals would bunch up considerably after one of these delays in reporting. After there was a decline, I billed up a lot of sugar immediately afterwards. The refiner never complained of this practice.

Redirect examination.

By Mr. Peck:

I did not tell the refiner I was holding up the billing.

[fol. 1735] Recross-examination.

By Mr. Fly:

I stopped storing sugar subsequent to May 2, 1929.

Redirect examination.

By Mr. Peck:

The refiner did not have any report that I know of about my practice of delaying billing.

Recross-examination.

By Mr. Fly:

The practice of withholding billing continued right up to the time I quit storing sugar.

[fol. 1736] LEONARD C. ADAMS was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I have been connected with the Adams Brokerage Company of Jacksonville since 1925. It is owned by my father

and myself. We are food brokers and represent National. At one time we stored National's sugar in our warehouse. We discontinued in the latter part of 1927 when we gave up our warehouse.

Our practice, in reporting to the refiner withdrawals made by our customers from our consigned stocks, was at times to hold up delivery-from-consignment reports in case the market was weak. We held up the D from Cs for a week to two weeks so that if the market declined the buyer could get the benefit. This was customary in our market. The buyers all expected it. If one wanted to sell sugar he had to do it.

Practically all of the sugar which comes into Jacksonville comes in by boat and is unloaded at the pier. We have an arrangement with the Clyde Line which will switch a car to our warehouse or give us a trucking allowance if we have it trucked. The switching is in carload lots and the trucking in less than carload lots.

[fol. 1737] Some of the sugar went directly from the pier to the jobbers' warehouses and some of it was taken from our warehouse. Our office later reported the withdrawals of sugar which went directly to the customer from the pier. We charged the refiner storage on that sugar. In some instance, it was turned over to the customer and in some instance, we kept it.

The auditors of National called on us to check our stock twice a year in 1926. It was understood with the buyers that if an auditor came in the sugar was to be billed up.

Cross-examination.

By Mr. Fly:

We did not hold up the billing on all of our sugar. The ones we did hold up were for a week or two. We held up the billing on carload orders for sugar when we sold it to buyers' warehouses and when the market was weak. We falsely reported to the refiner that sugar not under contract had entered our warehouse. If the auditors came in the morning, we would make out the consignment report as if the sugar had been delivered the day before. The auditors called for the D from Cs right away and we said that we received the sugar order and it was delivered yes-

terday afternoon. At least ⅔ of the time we had sugar out in a jobber's warehouse.

When the auditor saw us making up the D from Cs he never asked any questions about them. As long as our stock checked he made no complaint. We never had any complaints from National about the way we carried out our warehouse transactions and made out our reports.

[fol. 1738] LeRoy Moore was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I am connected with the Lefevre-Armistead Company of Richmond, Virginia. They are brokers. I have charge of the sugar department. We have represented National for 10 years. Prior to the middle of 1929 they stored their sugars with us. At times, if the market was in a weak condition, and we thought it was likely that there would be a reduction in the price of sugar, we would delay billing spot deliveries. The purpose was to allow the buyer to receive the benefit of any lower price if there should be one.

It has been our practice to divert cars consigned to our warehouse to customers. When we diverted these cars, we charged the refiners storage. I reported the withdrawals at various intervals. I would check whatever stock the jobber had sold and we would then report. I did not tell anybody representing National about our practice in this regard.

The auditors of National checked our stock. On such occasions, I would tell them that these sugars had been sold just prior to their arrival, either the night before or the morning before they came into the office. We then made D from C's covering the sugars and bringing the withdrawals up to date.

Cross-examination.

By Mr. Fly:

When the auditors called we had quite a bunch of D from Cs. The auditors made no complaint about that. The re-

finers made no complaints to us about the way we ran our warehouse or the way we reported the stocks.

[fol. 1739] AUSTIN WHITENER was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Peck:

I represent the account of Savannah Sugar Refining Corporation at Cleveland, Tennessee. Prior to the middle of 1929 they stored sugar with us. We would make withdrawals from the warehouse for the jobber and would sometimes hold up the billing because of the possibility of a price decline. We would hold it up probably a week or 10 days. I never told anybody connected with a refinery that we were holding it up.

Cross-examination.

By Mr. Fly:

There would be quite an extraordinary number of consignment reports bunched at one time. The refiner never complained about the way I ran my warehouse or made the reports.

[fol. 1740] JAMES H. POST was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Higgins:

I am president of National Sugar Refining Company and have occupied that position since 1900, when the company was formed. I have been in the sugar business since 1875. I am in general charge of the executive operations. After consulting with my associates, I have the final decision, subject to the control of the Board of Directors, as to sales and prices. I am and have been in regular attendance at the offices and in active executive work. I am fa-

miliar with competitive conditions which existed in the sugar industry in the years prior to 1928.

Over a period of years prior to 1928, secret rebates and concessions had grown to be quite general. To meet competition, we gave some kind of rebates—the same kind, as far as we could discover what they were. The information came to us largely through brokers and sometimes through buyers. The statement would be made that unless we could meet the concessions, the business would be taken to another refiner. I had no means of checking up the truth of those representations. I had complaints from our customers that they were not getting rebates that they sus- [fol. 1741] pected were being given. The situation led to great demoralization in all features of the sugar business throughout the country, to several years of very unprofitable business and to very heavy losses for some refiners.

We had no definite information as to melts, stocks and deliveries, to enable us to carry on our business intelligently. We had to guess at the stocks of sugar throughout the country. The only information we had as to deliveries and the market, was our own.

I participated in the meetings in the latter half of 1927 preliminary to the organization of the Institute.

Our company and the others, I think, were very much ashamed of the kind of business we had to do. It was very humiliating to have to be unethical in our transactions and we all welcomed the opportunity to try to work out some legal method of conducting business without unethical conditions. Some of the unethical conditions which we were ashamed of were discussed in great detail. Cummings was a great help in his advice and after some months we finally worked out this Code of Ethics. Quite a number of the refiners who participated in these meetings admitted they had been doing these unethical things. Arbuckle, Revere [fol. 1742] and C. & H. were not in the habit of making these concessions.

The desirability of statistical information was discussed. We all realized that the real situation was a matter of guesswork and welcomed an opportunity to have statistics given to us in a reliable way through some organization.

We were warned by Cummings that price fixing or maintenance was one of the subjects which we were never to discuss. There was never at any time any attempt to get

the refiners together on any arrangement to maintain or advance the prices or to agree upon prices. There has been no such attempt in connection with the operations of the Institute since it was organized. I have never heard of discussions of that sort, either at the Institute meetings or among the refiners outside of the Institute meetings.

There was no discussion at the meetings before the Institute of any division of sales territory or anything of that sort. At one time it was suggested that some plan might be worked out for the limitation of allotment of melt but Cummings assured us that was not anything we could in any way consider. I have never heard the subject discussed at any Institute meeting or outside of Institute meetings.

[fol. 1743] Our company gave secret concessions and rebates to special customers before the Institute. These matters were always taken up with me at the time we were deciding whether to give a concession to a particular customer. We were all very eager to obtain customers and were influenced by the fact that unless we made concessions, under certain circumstances, we would lose business. We had the statement of the broker who presented the claim or the merchant who may have talked to us regarding a concession that was being given or offered by a competitor to a particular customer. We had no means of determining the accuracy of that information. The concessions were not given openly and generally to our customers and were not set out on the face of the contract. We did not notify our customers that we were giving these concessions to certain customers. Some were straight rebates, some were storage allowances of various kinds and sometimes there were freight absorptions. Those were the principal ones. There was a concession called "advertising allowance" but it was given only in a limited way. We stored with a number of our customers in their own warehouse and they had the opportunity of withdrawing sugar [fol. 1744] as they required. They did not have to take any risk of the market. The fact that a buyer could withdraw sugar as he wanted and report practically at his own discretion was a great advantage to him. He did not pay until the reports were filed with the company and a bill rendered later. The privilege was not granted to all of our customers.

In some cases we granted to our customers the right to buy sugar after we had gone firm to the rest of the trade. We made allotments to brokers, not with the idea that they could sell after an advance, but the result was that very often sales were not reported until 2 or 3 days after the advance.

Allowances in the form of so many cents per bag, whether it was advertising, storage or what-not, were usually sent to the customer by check.

Some grocers received a storage allowance even though they never took the sugar into their own stocks, but we had no way of checking it. We agreed to store with a broker for 30 days but when he received a carload of sugar we had no way of knowing positively that it went into his warehouse. The storage allowances to customers varied considerably. Some were for 5¢ and some for 10¢.

The advertising allowance was based on claims. We [fol. 1745] hoped that our customers were advertising our special brand but we had no way of knowing whether they did or not. We did not make any contract with them that they would advertise or to provide us with any special amount of advertising. I doubt if we ever made any effort to learn whether or not they were in fact giving us any particular amount or kind of advertising. We also gave cartage allowances.

The amount of an allowance was determined by the trade in each case. There was no regular rule and it varied with different customers. The reasons that caused us to give 5¢, 10¢ or 15¢ a bag were submitted to us by the broker. He said it was necessary in order to hold the business and in order to meet the competition of other refiners.

We were all very unhappy about the practice of giving secret concessions to special customers and very much ashamed that it was necessary for us to do so. It was very unfair and very unethical to continue business in that way but we had drifted into that manner of doing it. We would have welcomed an opportunity to try to correct it. It would not have been possible to do so without the cooperation of practically all the refiners.

[fol. 1746] Since the organization of the Institute, the final decision as to determining what prices should be or whether we should advance, maintain or decline them was, as a rule, up to me. We took into account our stocks of raw sugars, our undelivered orders on our books, our

stock of refined sugar in a great many markets and the conditions of the trade generally. Since the Institute, I have never had any conference or discussion with the other refiners in which I asked them to advance, maintain or decline their prices or in which I assured them that if they would advance, maintain or decline their prices I would do the same thing. We knew it was not correct to do it and have never discussed prices with our competitors. The members of the Institute, executive officers, or those connected with it, have never sought in any way to influence my prices and price changes and asked me to advance, maintain or decline prices or to act in concert with other refiners in such manner.

Cross-examination.

By Mr. Rice:

It would not have been possible for me independently of the other refiners to eliminate the concessions and allowances that I have testified about. You cannot eliminate competition without concerted action among all or practically all of the refiners concerned in the competition. I do not mean literally all.

[fol. 1747] When we gave an advertising allowance to a customer before the Institute we expected that they would of course sell more of our "Jack Frost" brand of sugar but we did not make that a condition or make a special contract to that effect

When I gave storage and similar allowances, I knew that they were really allowances and I was not fooled into thinking that I was really paying for storage. I made that allowance to that particular customer at that particular time to meet the competition I was having from somebody else or that I thought I was having from somebody else, according to the customer's statement.

Redirect examination.

By Mr. Higgins:

To the best of my knowledge and belief my company has not granted any secret rebates or concessions since the organization of the Institute.

[fol. 1748] CHARLES B. CASTLE recalled.

Direct examination.

By Mr. Higgins:

I am familiar with the concessions which were granted by National and called "storage", in the years before the Institute. In those years, I was head of the consignment department which was part of the sales department and in that capacity handled the records of our consigned stock, shipments and the payment of storage charges and the invoicing of sugar. Our payment of storage was based on the representation of the buyer or his broker that this concession or type of allowance was offered to him by a competitor and that unless we met that competition it would be necessary for him to change his source of supply. We did that. The sugars were shipped out on consignment basis and invoice was rendered to us for storage. The amount varied. In some instances there was no storage paid at all. In other cases it ranged from 5 to 10¢ a bag. That was a flat charge and did not depend on the length of time the sugars were supposed to be in storage. Whether the amount was to be 5 or 10¢ a bag was determined by the representation that that amount could be secured from a [fol. 1749] competitor. The same representation determined our giving a concession in the form of consignment with the customer without the payment of storage. This eliminated for the customer the risk of a market decline. It eliminated any investment or carrying charges in regard to that stock. We also carried insurance on that stock up to the time that it was reported as withdrawn. In the case of the customer who did not get the storage consignment, it would necessitate direct shipments from the refinery and when the sugar was loaded in the car the risk of the market from then on was his, including the transit time.

With regard to sales by contract, the market risk was not a factor. Those sugars were stored in the jobbers' warehouses and when withdrawn would be applied against the contract.

We did not have any general follow-up or audit system of these stocks which were stored in the customers' warehouses. We did not audit all or any substantial portion

of them because of the competitive situation. Other refiners were doing the same thing and we did not want to offend the customer.

[fol. 1750] When we paid actual storage to customers, the amount was not based on any agreement, either oral or written, as to the length of time they were to store the sugar. The allowances were generally from 5 to 10¢ a hundred pounds. We never attempted in any way to determine whether or not the sugar went into storage. In some cases we paid storage allowances on direct shipments which we knew never went into storage. We did not give the storage concessions to our customers generally but only to meet a representation that it was offered by a competitor.

Cross-examination.

By Mr. Rice:

When a customer represented that he was getting a storage allowance from our competitors I did not know that he was not getting the allowance that he represented he was getting. As far as I know, he may have been telling the truth. There was no deceit upon National in connection with these storage allowances. I knew he was collecting the money whether the storage was earned or not. The man who bought 30 bags would not receive a warehouse allowance. To some extent, the size of the customer had some effect upon the warehouse allowance because of the requirement of carload lots of sugar.

[fol. 1751] Redirect examination.

By Mr. Higgins:

In the majority of cases the customer sent us the invoice showing the consignment in lot numbers. We checked it against our records. It was approved for payment and our check sent to the customer. In other cases, the buyer deducted the amount when he remitted. There was no written contract providing for storage allowances. The brokers would come to us and say a buyer had been offered a consignment in his warehouse. In other cases they would say he had been offered a consignment in his warehouses with

a nickel storage and to meet that competition we would do the same.

On the second page of Exhibit C-9 under the heading "Storage in Customers' Warehouse," but not carrying or indicating any amount of allowance, the customer described and the allowance described is the character of allowance which I have described where storage was made with the customers but no amount of storage was paid to him.

Defendants' Exhibits D-9 and E-9 were marked for identification.

In the succeeding sheets of Exhibit C-9 under the heading [fol. 1752] "Amount of Allowance" the wording "Storage in Customers' Warehouse" appears without any amount of allowance set up. It is similarly the same character of storage without the payment of an amount. The third sheet under "Storage in Buyers' Warehouse" is the same type. The word "buyer" is used instead of "customer."

Cross-examination.

By Mr. Rice:

In 1927, 78 customers who bought less than 10,000 bags a year were receiving concessions.

[fol. 1753] ALFRED H. MUNCH was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Higgins:

I am assistant comptroller of National. Exhibit C-9 is a compilation of the concessions of various types given by National in 1927.

Defendants' Exhibit C-9 was received in evidence and defendants' Exhibits D-9 and E-9 were marked for identification.

I had direct supervision of the accounting end and the handling of checks, credit memoranda, other accounting documents and accounting entries relating to concessions

and allowances granted by National in 1927. I audited the concessions, allowances, vouchers and payments as they were made. There is not included in Exhibit C-9 such type of allowance or concession as allotments to customers or repricing of contracts after the contracts had been entered, and the market for sugar had fallen and other allowances not represented in our allowance and concession classification in the terms of cents per bag.

In Exhibit D-9 for identification there appears under the heading "straight price allowance" opposite "Customer No. 17" the figure 5. That indicates we considered the price [fol. 1754] allowance a straight rebate. That is differentiated from advertising, cartage or storage allowances. It was the practice generally to make up a list of deliveries for the buyer each month showing him the invoice number, date of delivery and pounds. Then we extended the amount of the allowance and generally sent that statement attached to a memorandum along with a check in payment. That was the general practice in the straight price allowance.

I have examined my company's records in connection with the straight rebates and picked out the type of credit memoranda and other documents that accompanied the handling or accounting of such allowances. Exhibit F-9 is a typical document under which such allowances were made.

Defendants' Exhibit F-9 was received in evidence.

The omission of straight price allowance in the group of concessions to customers buying from 10,000 to 20,000 bags a year means that there were no straight allowances in that group.

The notation "check herewith" on Exhibit F-9 explains [fol. 1755] how the customer received the money. The amount of the allowance for the accounting department was determined as follows: A memorandum was handed up to the accounting department by the sales department authorizing issuance of the check in payment of this allowance. Generally, it gave specific details of what it covered; either a grade or straight price allowance. That was the basis of our authority to go ahead and make payment. The memorandum of authority was extended for a customer until we were notified not to make an allowance any longer. It had nothing to do with the contract. The authorization to give that amount of allowance or character of allowance was in-

definite. The allowance continued until we were told to stop or to increase it, as the case might be. Until we received contrary instructions, in the carrying on of our regular accounting work, we allowed our customer, on all his purchases, the amount of concession indicated by the first authorization.

In Exhibit D-9 for identification under the second column "Advertising Allowance—10 on cartons only," the allowance was handled similarly to the straight price allowance with the exception that the allowance was not applied on all [fol. 1756] sugars. That applied on cartons only. We went through the same procedure as with the straight allowance. We made up a statement monthly showing the figures that were eligible for the allowance and attached it to a credit memorandum. It was sent to the customer with a check. We received our authorization for advertising allowances in the same way as I have testified about straight allowances. It continued until we were instructed to the contrary and applied automatically to all of the customer's purchases.

Exhibit G-9 is a photostat of the type of document made out in our accounting department covering advertising allowances.

Defendants' Exhibit G-9 was received in evidence.

The cartage allowance of 10¢ to customer #1 on Defendants' Exhibit D-9 was a type of allowance in which buyers hauled their own sugars and we reimbursed them to the extent that appears on this statement, for all sugars hauled by them. We did not make the same amount of allowance in all cases as we did in Exhibit H-9. In handling the ac- [fol. 1757] counting on the cartage allowance, we were given authority to allow on all sugars hauled by the sales department and for sugars hauled by the buyers. There were communities where we charged the customer for our hauling of our sugar. In cases where we did not haul, but where the customer came and got the sugar with his trucks at our delivery point, we made allowance over and above what we were charging our own customers for delivery. Our allowance includes the amount which we paid the customer in money. We did not do that for all customers in these communities.

Defendants' Exhibit H-9 was received in evidence.

Exhibit I-9 is a photostat of the various types of documents which were made up and passed through the accounting department in connection with storage allowances, with the exception of the middle item which is the customer's document. That is what came in from the customer to us.

Defendants' Exhibit I-9 was received in evidence.

[fol. 1758] Exhibit I-9 does not represent the only type of document of our storage allowances. Exhibit J-9 is another type.

Defendants' Exhibit J-9 was received in evidence.

In the instance of Exhibit I-9 we did not send a credit to the customer. He knew of the allowance. He sent us a charge with his remittance. The lower figure is his remittance. It appears under "Collection Department." That is the form in which we placed customers' remittances and indicates a deduction for an item of storage. The middle document supports this deduction. To clear out our accounting records we issued that credit, but did not send it to the customer. On the credit it says, "entry only," and that indicates by our records that the credit did not leave our office or did not go to the customer. The reason the credit memorandum was not issued on March 8 whereas we got the cash on January 13 was due to the delay in office routine.

Under the procedure followed in Exhibit J-9 the storage bill was sent to the office and passed along to the consign-
[fol. 1759] ment department which had authority to pay storage. After proper checking of rates and quantity it was passed along to the accounting department for payment. The consignment department checked all the storage allowances which we made which did not represent actual storage, as well as the storage payments to public storage warehouses. The statement indicates we sent a check for $95.

Exhibit K-9 is a photostat of our accounting documents relating to allowances for differentials. It represents the typical documents in the case of such allowances.

Defendants' Exhibit K-9 was received in evidence.

The exhibit is an allowance in a case where we sold sugar which had a differential on it above the basis of fine granulated in 100 pound bags. We had an announced differen-

tial of 5 or 10¢ above the basis. In this instance we sold sugar on which there was a differential but we allowed the customer a revision downward from that allowance price or a differential. Generally, the differential allowances rep-
[fol. 1760] resented the full differential between the higher price and the basis price.

The column headed "Cartage Allowance—5 and 7½" opposite customer #22 in Exhibit D-9 for identification signifies a change in the rate. A rate of 5¢ had been obtained in the early part of the year and later a 7½¢ rate was obtained. The asterisk under the columns "Storage Allowance" and "Total Amount of Allowance" in the pages of Exhibit D-9, represents storage in customers' warehouses without the payment of any storage amount. The entries of 5¢ on standard granulated under the heading "Miscellaneous" on page 2 of Exhibit D-9 refers to 5¢ on standard granulated sugar. The allowance of 11¢ on returnable bags to customer 76, who bought 9,730 bags, means the customer returned them and for the ones which were in good condition we repaid him at the rate indicated. The total amount of the allowance to the customer was 16¢, taking into account the 5¢ rebate on standard granulated sugar and the 11¢ paid on returnable bags, if he bought all standard granulated sugar. This $9,775 does not necessarily mean that that was all standard granulated sugar. If a customer bought carton or package sugars, or soft
[fol. 1761] sugars, he did not get the 5¢ allowance. On page 2 wherever "5-" is seen, it means the customer did not get it on all sugar, but he received the full amount on the granulated sugar. On page 2 under the column "Total Amount of Allowance," where the figure "2" appears opposite customer 113 it means there was a rate of 2+ at one time. The figure 2+ means there was a rate of 2 at one time and 4 at another and that he got more than 2¢ on his sugar on the average that year. In each case our use of the plus sign following the figure under the column "Total Amount of Allowance", is intended to indicate that, calculated on his total purchases of sugar, he received more than the figure under "Total Amount of Allowance." On the sheet marked "Concessions to Customers Buying from 10,000 to 25,000 bags a year" we show customer 91 receiving 50 per ton. That means 50¢ per ton. The statement indicates that all figures quoted are cents. It comes out to 2½¢ a 100 pounds.

The allowances of various types were handled differently in the routine course of business from our regular accounting which did not involve allowances or concessions to cus-
[fol. 1762] tomers. To this extent straight price allowances and some of the others were handled by one man in the accounting department with respect to the compilation of the statement which had to be passed along. We tried to confine it to one man in order to keep it as secret as possible. We did not want too many people involved. As far as possible we wanted to keep it confidential within the organization. The information on straight price allowances and advertising allowances was pretty closely held by a group of our accounting department called our "adjustment department". With some exceptions, we sent out these remittances as ordinary remittances in the course of payment of our bills. In one instance, we had specific instructions to send it to some high executive official of the company. We tried to keep the practice confidential to the extent of letting as few people as possible know about it. It had to go through a certain routine which we could not avoid but where it was possible we did try to avoid it.

The concessions referred to in Exhibits C-9 and D-9 were not provided for on the face of the contract or in the
[fol. 1763] written contracts made with the purchasers of sugar.

The authority for calculating the allowances and preparing checks and documents covering the making and remittance of the allowances was a confidential memorandum held in the accounting department. In the case of storage, it was held in the consignment department. In practice, the storage allowance which we gave and the storage paid to the regular storage warehouse company was handled practically the same way, except where the buyers made deductions. In that case, we issued credit memoranda for the internal record to get it off the account. The payments of storage, where a buyer entered an invoice for storage, were handled in the same way. The bills differed to this extent, that they rarely showed the period of time for which the storage ran and the rates applying generally were so much per 100 pounds. They differed from a public warehouse bill in that the rates are generally so much per bag, barrel or container and were never rendered on the basis of 100 pounds weight. The storage allowance

was generally 5 or 10¢ a 100 pounds whereas the public warehouse rates were 5 and 7¢ and odd rates. I never [fol. 1764] knew of a public warehouse which charged 10¢ a 100 pounds for the first month's storage. A buyer's warehouse consignment remittance never covered handling charges. In most cases the public warehouse remittance did.

Advertising allowances were never approved in the advertising department. Invoices for advertising service by outside companies, publications and so on, all passed through the advertising department for their approval and were paid on the basis of this approval. It was not necessary to pass through the advertising department an advertising allowance which was a concession. So far as I know, they knew nothing about it and did not approve it in the ordinary course of business.

To my knowledge National has not given any of these concessions or allowances of any character described in my testimony, on business handled since the formation of the Institute.

Cross-examination.

By Mr. Rice:

Storage allowances, advertising allowances, and these straight allowances that were rebates, were not shown on the customer's invoice. At the end of the year in getting up our statistics we added together all of the goods sold during the year to all of our customers, as shown by their invoices.

For the purpose of ascertaining how much we actually received net for the sale of our goods during the year, we did not subtract all of our different allowances from the total of our invoices. We subtracted only the straight price allowances or rebates. We did not subtract the other items, because they would go into the expense account.

I assisted in the preparation of the document showing the refiner's margin for the 3 years prior to the Institute and 3 years after the Institute. This was prepared for the years 1925, 1926 and 1927 by deducting from the total invoicings the total appearing in the allowance account in which the straight price allowances or rebates were charged. We did not deduct any of the other allowances.

Mr. Higgins: It is true that some of the refiners in computing their margin figures for the period before the Institute when certain allowances were disguised as advertising or storage or under other expense names, did not deduct them from the actual net price they received for their sugars; that they did, as Munch describes in making up their margin figures, deduct those things that were only straight refunds or price concessions, so in fact the only way we have of determining the net realization of the refiners before the Institute as compared with the period since the Institute is through a series of elaborate figures in which they collect from their books these various other kinds of disguised rebates and include them into the actual purchases of the refiners before the Institute, because they kept their books on a different basis, and following our instructions sent out from the office they did not always interpret concessions as what the evidence in this case shows the concessions really were.

Defendants' Exhibits U-9 and V-9 were received in evidence.

[fol. 1765] RALPH S. STUBBS was called as a witness on behalf of the defendants.

Direct examination.

By Mr. McGratty:

I have been employed by American since July, 1916. I was appointed general manager in charge of operations in the latter part of 1917, elected vice-president in charge of operations in 1920 and in 1929 my jurisdiction extended to sales.

As a result of audits which had been made by our auditors we found in the early months of 1930 what appeared to be a very serious situation in connection with the handling of certain of our stocks of refined sugar under the jurisdiction of W. H. Edgar & Son.

In addition to shortages which were specifically developed, our auditors' investigation showed instances of the improper use of transit billing, great laxity on the part of the Edgar organization, improperly supervising and exer-

cising the necessary care which we expect of our broker in accounting for sugar which is damaged or short on receipts from carriers. We found instances where they would deliver competitor's sugar on our contracts.

The so-called "Joseph Mesh" transaction at Detroit was [fol. 1766] significant in the fact that the Edgar organization was not performing its functions as a broker with regard to our sugar, in a proper manner.

After the receipt of the information I first directed our auditors to continue their general audit so as to comprehend an investigation of all stocks consigned to Edgar's care. In March, 1930, I had a meeting with Beebe who at that time was in active charge of Edgar's sugar distribution. He came to New York on March 18th and a conference was held in which he and a number of the department heads of my company were present. I reviewed with him the entire situation as disclosed by our investigation and laid before him specifically the auditors' report showing shortages in consigned stocks in the cities of Buffalo, Cleveland, Akron, Dayton, Cincinnati, Detroit and Indianapolis.

I did not at any time have any understanding with Beebe or any member of the organization with reference to the plus and minus or long and short method of handling consigned stocks as described by him. I have read his testimony on this point. I did not have any understanding with [fol. 1767] any member of the Edgar organization whereby Edgar the broker might sell 10,000 bags of American's consigned stock in Chicago, fail to report the sale and deliver all that 10,000 bags, enter into the Edgar book a plus or minus indicating the fact that he owed us 10,000 bags of his own American sugar that he had bought and paid for for merchandising at Detroit and not report the sale of the American consigned stock at Chicago until some later date when he sold the Detroit stocks, of which he had acquired ownership. Prior to the time that Beebe testified I never heard of such an agreement.

At the conference I had with Beebe relative to this shortage he made no statement to me with regard to an arrangement he had with American relative to the plus and minus or long and short system. He stated to me that, as a result of the disclosures which I had laid before him, he would have to admit that my charge of gross negligence on the part of the Edgar organization in handling our consigned

stocks was justified. He attempted to explain that those irregularities were inevitable as a result of the large volume of business which passed through the hands of the Edgar [fol. 1768] organization and particularly because of the various guises under which the Edgar organization had operated in the past. He further added that their clerical machinery had practically broken down because of this large volume of business and that they were particularly handicapped because the man who had been in their employ for many years in charge of accounting and traffic matters, had left their service. What I gathered from his use of the term "various guises" was that during the past year, operating as the Edgar organization or as brokers, warehousemen, merchants, truckmen and transportation agents, in fact, in almost every element involved in the field of refined sugar distribution, the combination of those elements, many of which were conflicting, brought about some of these conditions which we were discussing at the time of our conference in March, 1930.

We discussed primarily the evident laxity in properly checking or instructing the warehouses to check our deliveries from transportation carriers, which resulted in our not being suitably protected in our subsequent claims against those carriers; in the improper use of carriers' [fol. 1769] transit billing; as to the use of competitor's sugars in our contracts; in their failure to properly keep our warehouse stocks in suitable order and condition and the so-called "Joseph Mesh" transaction in Detroit.

Exhibit L-9 is a carbon copy of a memorandum dated March 19, 1930, addressed to Abbott, president of our company, which I wrote and which sets forth a summary of the developments at the conference of March 18 with Beebe. It also includes conclusions which I reached as a result of that conference and likewise it includes certain recommendations which I made to Abbott to govern our future relations with Edgar & Son. Subsequent to the conference I discussed the same method with Edgar in my office on March 28, 1930. I reviewed with him the various matters which had developed in the course of my conference of March 18. I am familiar with Exhibit L. After acquainting Edgar with the matters that developed in the course of the conference with Beebe 10 days before, he asked me if I would set down the points which were comprehended by this investigation. In com-

pliance with his request I handed him this list of 10 points which I had previously prepared and which I informed him [fol. 1770] were to serve as the method under which future relations between Edgar & Son and American were to be conducted.

Edgar said he saw no reason why his company could not comply with every stipulation and he accepted the method as it was given to him. I suggested that the following month of April be used as a test or probationary period to find out if the Edgar organization could comply with the rules which I had laid down. I directed our general sales manager White to issue written instructions to each of our sales offices embracing the main points which were involved in my discussion with Edgar. Defendants' Exhibit M-9 is a copy of the instructions sent by White to the various sales offices governing their future relationship with Edgar & Son.

Defendants' Exhibits L-9 and M-9 were received in evidence.

I had a conference with Beebe in Chicago April 19, 1930. Our sales manager Murphy informed me that they had just uncovered a serious situation with respect to the [fol. 1771] handling of our consigned stock in Muscatine, Iowa. He told me that he had been searching for 2 cars of sugar which had been sent to Muscatine about the midsummer of 1929 and they could get no information as to the disposition of that sugar, which was consigned to the C. F. Fulliam warehouse, in care of Edgar & Son. The warehouse company had referred him to Edgar & Son, Detroit. Murphy then sent one of our auditors, Weidner, to Muscatine to ascertain the facts. Weidner's written report had just been received by Murphy at the time of my call at his office on the morning of April 19 (Exhibit N-9).

Defendants' Exhibit N-9 was received in evidence.

Learning that Beebe was also in Chicago I asked him to come to Murphy's office, which he did, and I revealed to him what the auditor's report disclosed, that these 2 cars of sugar comprising 1,200 bags, had been delivered to individual customers in Muscatine and the vicinity over a period of months beginning in the summer of 1929 and running into the early months of 1930. I asked Beebe

[fol. 1772] where the accounting was for these deliveries. He told me that a D from C had already been issued covering these transactions and gave me the impression that it was one D from C to 1 customer covering the total deliveries, which was entirely at variance with the facts developed by our auditor. I told Beebe I felt we would be justified in billing each individual customer to whom, as shown by our investigation, delivery had been made. Beebe asked me not to take such action and said he would look into the matter on his return to Detroit.

The first document in Exhibit G-2 was secured from our New Orleans office. The other documents were additional D from C's which were issued finally in lieu of the D from C dated March 29, 1930, making an accurate accounting for the additional deliveries of the 1,200 bags of sugar at Muscatine with the actual dates the sugars were delivered to the customer.

Defendants' Exhibit O-9 was received in evidence.

In Indianapolis we discovered a shortage of 1,158 bags, at Cincinnati a shortage of approximately 3,000 bags, at Dayton a shortage of 840 bags, at Buffalo a shortage of [fol. 1773] 236 bags, at Akron a shortage of 834 bags, at Toledo a shortage of 326 bags, at Cleveland a shortage of 1,689 bags and at Detroit a shortage of 2,103 bags. In connection with the Detroit shortage I have a very clear recollection which is not stated in my report of March 19, 1930 that our auditors explained to me at the time I was discussing the matter with them that shortages at Detroit had been disclosed in the neighborhood of some 10,000 bags, covering which D from Cs had been issued prior to our conference of March 18 with the exception of this balance of some 2,000 bags.

Edgar finally furnished D from Cs covering the Indianapolis shortage. The Indianapolis audit was made January 9, 1930 and the D from Cs covering that shortage showed deliveries on the short amounts made from May to December, 1929. Edgar paid those invoices. There were additional deliveries from the Indianapolis stock in that shortage which the Edgar organization had not yet furnished but which Beebe promised to clear up.

The audit for the Cincinnati shortage was made on Janu- [fol. 1774] ary 8, 1930, and the auditors finally secured

from Edgar D from Cs covering that shortage, going back to May 29 and he paid for them.

The D from Cs for the shortage of 830 bags at Dayton went back as far as June, 1929. The invoices covering those D from Cs had not been paid but we had assurance that they would be paid promptly that week. The shortages of 2,103 bags at Detroit was finally adjusted by Edgar's replacing 1,297 bags and issuing D from Cs on the balance. Those D from Cs were all paid. We received D from Cs from the Edgar organization substantially covering the shortages at Buffalo, Akron and Toledo. There were one or two minor exceptions.

We developed that, of the 1685-bag shortage at Cleveland, 1,432 bags had been transferred to Edgar's own stocks and disposed of by him from March 15 to December 19, 1929. D from Cs covering those were finally secured and the invoices were paid.

Beebe made no explanation of the transactions I discussed with him in connection with the withdrawal of our sugars from Detroit storage and the substitution of other refiners' sugars other than the general explanation which [fol. 1775] I previously stated.

The explanation which Beebe undertook and which I have explained on page 3 of the memorandum under the heading "Manipulation of D from Cs" was somewhat involved. He stated that his so-called manipulations were the direct result of Edgar's acting as a general broker or in connection with his merchandising activities and were due to arrangements made for the sale of certain sugars to certain customers and they supplied these sugars from other refiners' stocks or stocks which Edgar himself owned and when he found he was short of sugar he simply replaced those stocks he had previously sold by helping himself to our sugar. He issued a D from C to show the delivery to our customers appearing in our contract, which reconciled the apparent variations.

Where other refiners' sugars were delivered on American contracts and Edgar subsequently used American sugar to make up the shortage Beebe asked us to have that sugar billed to the customer in whose name the contract was held. It was billed by us against the D from C which showed Detroit as the destination. I reported to Beebe that we had [fol. 1776] evidence that sugars on our contracts, which

were ostensibly for delivery to firms in Detroit, had been transited on to interior points in Michigan and D from Cs issued showing delivery in Detroit. Edgar had billed the customer at the established Grand Rapids rate and had cleared for some one other than ourselves the difference between the proper rate at Detroit and the rate at interior Michigan points. Beebe's answer to that was included within the scope of his general answer which I stated in my previous testimony, that his clearing machinery had broken down because of the magnitude of the business and the various guises under which his organization had operated.

I did not state to Beebe or Edgar words to the effect that they had a clean bill of health on the matters referred to in Exhibits 177 and 178.

In regard to the 9 findings that were submitted by me to Edgar I came to the conclusion that certain of the allegations were sustained and certain of them were not. This conclusion was a result of our own investigation of the specific matters that were presented to Edgar by me on June 25, 1930 and incorporated in these so-called 9 points. [fol. 1777] With the exception of the various matters under complaint to which I have testified I would say our relations with Edgar during the past couple of years had been quite satisfactory. The satisfactory relationship started quite soon after the period of the conferences to which I have testified.

[fol. 1778] WILBUR L. CUMMINGS recalled.

Cross-examination.

By Mr. Fly:

At page 4543 I testified "The Sugar Equalization Board reported to the Food Administrator that the margin was inadequate and recommended its raise." The Food Administrator raised the margin to 1.42, and in 1918 the Board again reported on it to the Food Administrator who raised it to 1.54. I am not aware that as of the date of the second rise in the margin from 1.45 to 1.54 there was a change in the price of raw sugar from 6.00 to 7.28 or a rise of 1.28.

The price of raw had been going up and in September, 1918 the government contracted for the entire Cuban crop

at 5.50 f. o. b. Cuba. They added 38¢ profit, the tariff which was one dollar and the transportation cost which brought it up to 7.28, and contracted to sell to the refiners at this price.

Mr. Fly: I shall read from the report of the Federal Trade Commission on sugar supply and prices November 15, 1920, which counsel for the defendants sent to me as the basis for the statements made by Cummings on direct examination:

"Following investigations made by the Food Administration covering the costs of production by the Louisiana cane and Western beet sugar producers, prices of these sugars from the new 1918-19 crop were raised on September 9, 1918, to 8.82 per hundred seaboard basis, and agreements were entered into with these producers that distribution would be made under the direction of the Food Administra- [fol. 1779] tion. The remainder of the old crop sugar refined from imported raw can- sugar was at the same time advanced to the same price. The price of raw sugar to the refiner was raised to 7.28 per hundred—the Board absorbing the difference between this price and the old price of 6.00."

That is the 1.28 increase which I referred to.

"Refined sugars in the hands of refiners and producers were raised from 7.30 per hundred, the old price, to 8.82—the Board absorbing the increase. The refining margin, which from August 1 to September 9 was 1.45 per hundred, was raised to 1.54, effective September 9, 1918."

That relates to the old sugar crop, but that is the specific rise in the margin.

That rise in the price of the margin from $1.45 to $1.54 was the one that I mentioned and was a rise of 9¢. The increase in the margin was not based solely upon the 1.28 rise in the cost of raw sugar and I think the report so states.

I also testified at page 4546 of the record that in the production of 100 pounds of refined there is a loss of 7.19 pounds of 96% sugar.

Mr. Fly: To clarify the record on that point as to the 9¢ increase I would like to make the mathematical nota-

tion that 7.19 times 1.28 comes to 9.2 which appears to more than compensate for the increased margin.

The Witness: I do not want to sit here silently and accept all your statements. You have been testifying, not I. This is not the report which describes the operations in detail, but there is a paragraph that does describe it in considerably more detail than you have.

[fol. 1780] "At the close of 1918 a contract had been entered into whereby the United States Sugar Equalization Board was to secure the 1918-19 Cuban crop at a price equivalent to 5.50 f. o. b. Cuba. After allowing for transportation costs, import duty and profit of 38¢ per hundred to the Board, and a refiner's margin of 1.54 agreed upon by the Board and refiner, a refiner's price to the wholesalers of 8.82 net seaboard basis was fixed and a retail price of 11¢ per pound was made possible."

The price of raws up to that time had not been fixed. It was not until the government purchased the crop and sold to the refiners that the refiners had to buy at 5.50.

I do not take issue with the report from which Fly just read so far as there were any old crop sugars left in the hands of the International Purchasing Committee at that time; but at the time of the purchase of the Cuban crop at f. o. b., Cuba 5.50, that had about become the price of Cuban sugar, f. o. b. Cuba. I do not take issue with the statement that at that time the cost of the raw sugars which were purchased by those refiners was increased from 6.00 to 7.28 as respects any sugar that remains in the hands of the International Purchasing Committee. I do not find that limitation in the report here but I know that to be the limitation. I have not challenged any statement made in this paragraph but it is not capable of the broad construction you have put on it.

I do not know whether or not I can find in this report or any other official source any indication that the 9 cent rise in the margin was not due solely to the 1.28 rise in the [fol. 1781] course of the raw sugar. The refiners here continually presented to the Equalization Board the increasing and mounting costs of refining sugar during the war. Those factors were taken into consideration by the Equalization Board in fixing the margin from time to time.

I am not aware that the average apparent margin for the 12 years prior to 1914 was 86¢. I have no knowledge as to that. I do not recall reading the following statement at page 124 of the report of the Federal Trade Commission: "Some pertinent observations, however, may well be made. Prior to 1914 the average normal margin for 12 years was $.86 per hundred." I have no reason at all for taking issue with the statement.

It is my understanding that the rise to $1.54 went into effect as respects the Cuban crop and that the old margin was retained with respect to purchases made during the summer of 1918.

The $1.54 margin was not received by the refiners on sugars that they had already purchased. It applied only to the Government owned crop for which they paid $5.50 f. o. b. Cuba, and sold to the refiners at $7.28.

(The following was read into the record from Chapter 1, Section 4, page 26 and ending page 30 of the report of the Federal Trade Commission on Sugar Supplies and Prices, November 15, 1920:)

[fol. 1782] EXCERPT FROM REPORT OF FEDERAL TRADE COMMISSION

"Section 4. War-time control over sugar.

"The situation in the United States in 1919 was, of course, directly and intimately affected by the methods used by the Government in handling the sugar problem during the period when the United States was a participant in the World War. A brief review here of these methods will aid in the understanding of what follows:

"During January, 1917, the price of duty-paid raw sugar in New York City averaged $5.24 per hundred. By August 7, it had reached $7.52. Some measures were deemed necessary to stabilize prices and to prevent undue rises.

"Under the food-control act, approved by the President, August 10, 1917, Herbert Hoover, Food Administrator, organized a sugar division, and on August 15 placed at its head George M. Rolph, an experienced refiner.

"On September 5, the cane sugar refiners agreed to import all foreign raw sugars through a committee to be named by the Food Administration, and to refine at a stipulated margin. On October 1 this margin was set at $1.30

per hundred pounds, and the International Sugar Committee was designeted as the committee through which purchases of sugar should be made by refiners. On September 7, importers, refiners, and producers were made subject to licenses to be secured from the Food Administration not later than October 1. On August 27 the Beet-sugar producers entered into a voluntary agreement with the Food Administration to sell sugar produced by them at $7.25 per hundred pounds, f. o. b., seaboard basis.

"Cane sugar refined on the Pacific coast and beet sugar were restricted by the Food Administration to the territory west of Chicago and St. Louis, and sold at $7.25 per hundred, plus freight from nearest seaboard refining point; while cane sugars refined on the Atlantic and Gulf coasts were restricted to eastern territory and were sold at $8.35 to $8.50 per hundred, seaboard basis, the price of raw sugar having dropped about 50 cents a hundred at New York City since August 7.

"On September 20, 1917, the appointment of three committees was announced by the Food Administration: The International Sugar Committee, referred to above, which represented both America and the Allies; the American Refiners' Committee, which allotted raw cane sugar to American refiners; and the Sugar Distributing Committee, [fol. 1783] with headquarters at Chicago, controlling the distribution of beet sugar only. A committee was later appointed, which had the supervision of the distribution of Louisiana cane sugar.

"Late in December, after some weeks' negotiations between the international sugar committee and the Cuban commission appointed by President Menocal of Cuba, the purchase of the 1917-18 Cuban crop by America and the Allies was announced, two-thirds for America and one-third for the Allies. The price was $4.55 to $4.60 per hundred, f. o. b. Cuban ports, or approximately $6, duty paid, New York City.

"In the summer of 1918 it became necessary for the Government to plan for the control of the 1918-19 crop. Cuban sugar could be purchased, refined, and marketed for considerably less than the American beet and Louisiana cane could be produced and sold for with fair profits to all. If the price for Cuban raw sugar should be based on that which afforded fair profits to the American producers it would give unduly large profits to the Cuban growers.

Some agency was needed to eliminate from prices these differences of costs. For this, and for other reasons, the United States Sugar Equalization Board (Inc.) was created under the President's war-emergency powers and a charter issued to it on July 11, 1918, under the laws of the State of Delaware. It was capitalized at $5,000,000 out of the President's war-emergency fund.

"The following paragraph from the announcement of the Food Administration, July 11, 1918, explains more fully its purposes:

"The purposes of the board are to equalize the cost of various sugars and secure the better distribution. The arrangements will facilitate joint dealing with the Allies in foreign sugars and the adjustments of differentials in overseas freight rates. Under certain circumstances it may be advisable to acquire the production of some beet-sugar factories that cannot under the present price of beets be sold to the public at a reasonable price. The board will take charge of the distribution plan initiated on July 1, and will conduct this plan at the expense of the board. The board will be incorporated to the extent of $5,000,000 of capital, which will be supplied by the President from his special funds, in order to enable it to deal with facility in foreign sugars and otherwise, and the whole stock will be held by the President for the United States Government. The object is to absorb the high peaks of cost in sugar production and to make a small margin on the low [fol. 1784] cost of certain foreign sugars which may be purchased, and thus secure an equalization of the price to the public on a lower level than will otherwise be possible. The arrangements will further secure an even distribution of the sugar throughout the United States. It is expected that any profit will be equalized to the consumer over the year's operations.

"Following investigations made by the Food Administration covering the costs of production by the Louisiana cane and western beet sugar producers prices of these sugars from the new 1918-19 crop were raised, on September 9, 1918, to $8.82 per hundred seaboard basis, and agreements were entered into with these producers that distribution would be made under the direction of the Food Administration. The remainder of the old-crop sugar refined from imported raw cane sugar was at the same time

advanced to the same price. The price of raw sugar to the refiner was raised to $7.28 per hundred, the board absorbing the difference between this price and the old price of $6. Refined sugars in the hands of refiners and producers were raised from $7.30 per hundred, the old price, to $8.82, the board absorbing the increase. The refining margin, which from August 1 to September 9 was $1.45 per hundred was raised to $1.54, effective September 9, 1918. On October 24, the 1918-19 Cuban crop was purchased by the United States Sugar Equalization Board. The price paid was $5.50 per hundred f. o. b. Cuban ports. A contract was entered into by the board with the refiners, as of the same date, whereby they agreed to purchase all raw sugars from the board at $7.28 per hundred and refine on a margin of $1.54 per hundred. Allowing for transportation costs and duty, there was a profit to the board on the Cuban sugars of about $0.38 per hundred.

"No contracts were made by the board or Food Administration with sugar producers of the insular possessions of the United States to purchase their raw sugars. Substantially all of these sugars of the 1918-19 crop, however, were purchased by the board at $7.28, f. o. b. refining points, and sold at that price to the refiners.

"Refiners' and producers' prices fixed, competitive distribution was largely eliminated.

"* * * refiners divided the available raw sugar between them in proportion to their respective refining capacities, and the Food Administration determined where the refined sugar should go, traffic permitting. This it did (a) by giving priority to the Army and Navy and assisting organizations in all orders to refiners; (b) by fixing for each refiner a territory outside which he was not permitted [fol. 1785] to sell; (c) by further limiting the sales of refiners in given States or districts within their respective territories; (d) by requiring from wholesalers, large retailers, and large bakers monthly reports showing the amounts sold or used by the license and his stock on hand; (e) by requiring reports from 'member' eating houses, rationed according to number of meals furnished; (f) by controlling the consumption of manufacturers, bottlers and drink dispensers through the issuance of certificates which were required for purchasing; and (g) by requesting voluntary limitation of home use to amounts varying from 2 to 4 pounds per person per month.

"Division of the country into zones of distribution, referred to under (b) above, was made possible by the agreements entered into between the Food Administration and the Louisiana cane and beet sugar producers and between the United States Sugar Equalization Board and the refiners. These agreements provided for central distributing committees under the supervision of the Food Administration and the board, which directed the movement of sugar so that each locality was furnished with sugar from points of nearest available supplies. Generally speaking, Gulf coast refiners and beet-sugar producers supplied the South; Atlantic coast refiners the East; beet-sugar producers the Middle West; and Pacific coast refiners and beet-sugar producers the West. The boundaries of these zones were changed from time to time as the supplies on which the zones depended became relatively scarce or abundant.

"The most important of the license regulations which at one time or another restricted distribution of sugar were as follows: Unreasonable profits and resales within the same trade were prohibited; speculation or sales to speculators were forbidden, secret rebates were prohibited; combination sales of sugar and other commodities, except cornmeal at the rate of 1 pound of sugar to 2 or more of corn meal, were not permitted. Wholesale dealers were prohibited from selling sugar at an advance over the refiner's list price greater than the normal margin or that established by the Food Administration, which was 35 cents per hundred pounds as a maximum (fixed at the prewar normal margin prior to June 6, 1918, or about 25 cents); when two or more wholesale dealers handled the same sugar the total margin was required to be not greater than that prescribed for one.

[fol. 1786] "Restrictions on consumption were inaugurated by the Food Administration, May, 1918. Manufacturers using sugar in nonessential products, except ice cream, were restricted to 80 per cent of the preceding year's requirements. The Federal food administrator of each State was authorized to issue certificates to manufacturers of the State upon receipt of sworn statements as to requirements, and such certificates, covering a certain quantity of sugar, were required to be delivered by the manufacturer to the distributor of sugar.

"On July 1, 1918, sugar-consuming manufacturers and retailers were divided into five classes: Class A, comprising all manufacturers of nonessentials, were restricted to 50 per cent of their requirements for the corresponding months of 1917; Class B, comprising manufacturers of essentials, were allowed their full needs; Class C, consisting of hotels, restaurants, and other public eating places serving regularly 25 persons or more, were allowed 3 pounds of sugar for every 90 meals served the third quarter of 1917; Class D, manufacturers of bakery goods, were permitted to receive 70 per cent of the sugar used in corresponding months in 1917; Class E, comprising retailers and other dealers selling direct to the domestic user, were allowed 3 pounds per customer per month. The food administrator for the State issued certificates to the above manufacturers and dealers on the basis of their allotments, the certificates passing back through distributors and refiners or producers to the food administrator issuing them. Household customers were expected to limit their purchases in accordance with the regulations governing retailers."

At page 5024 of the record, in discussing the various prices and the state of price competition in the different territories, I testified that in the period prior to the Institute the Southeast territory was not so highly competitive at that time but that it was pretty highly competitive because the New York refiners have gone down there to "butt in" on Savannah, but at that time they were not in that market and Savannah had that territory pretty much to itself. In my brief before the Tariff Commission at page 52, [fol. 1787] I said:

"'The transportation disadvantage of the domestic refiners is further extenuated by the fact that the competition of Cuban refined sugars is driving them out of those areas in which the importer has a freight advantage and is forcing them to seek more distant markets for their sugar, that is, increasing their average cost of transportation. This fact is illustrated by the testimony with respect to the Savannah Sugar Refining Corporation, as its sales in the state of Alabama, Georgia and South Carolina decreased because of Cuban competition and it was forced to seek new markets in the middle west."

It would be more accurate at least to say that the facts which I pointed out to the Tariff Commission should be added to my answer here about the New York refiners "butting in" on the territory. Cuba "butted in" also.

[fol. 1788] CHARLES B. CASTLE recalled.

Direct examination.

By Mr. McGratty:

National first employed Edgar as a broker in September, 1928. We consigned stocks in his care at Detroit. Two months later we consigned stocks in his care at Cincinnati.

I am familiar with the circumstances concerning the first audit of the Detroit stocks in the early part of November, 1929. I was in Detroit at the time and McGrath, our auditor, told me it was impossible to check the stock in the Detroit Harbor Terminal Warehouse. I went with him to Edgar's office and conferred with him and Beebe and several other members of their organization. All agreed that it was impossible to check up the stock without months of labor because Edgar's records were in such confusion. The Harbor Terminal reported delivery from 1 lot number and the Edgar organization apparently disregarded that lot number and applied it to any open lot number. Beebe stated this condition was the result of confusion arising from their merchandising activities. I arranged with Beebe that we were to bill Edgar for the shortages and credit him with any overages so as to start anew. We further arranged that [fol. 1789] on Saturday McGrath and a representative of Edgar and the Warehouse would go through all the stock, take an audit and then set up a new book for all 3. A settlement was made as a result of this arrangement and in September, 1930, we received a check for $1,250.

Prior to the audit I had no arrangement with Beebe or anyone in the Edgar organization whereby they could be short at one point and long at another or short on one lot and long on another. This was a matter which would have come under my direct personal supervision because I was in charge of the sales in that territory and the consignment department was directly responsible to me. So far as I

know, no other member of National had any special agreement with any member of Edgar's organization.

A dispute arose with regard to the consigned stock at Cincinnati. Our auditors and certified public accountants, in going over our records at the end of the year, required certification of the amounts we showed in our inventory in the various warehouses in which we stored our consigned stocks. We required each warehouse to send in a list of stock on hand as of December 31 of each year. As of De-[fol. 1790] cember 31, 1929, the B. & O. Warehouse mailed to our accountants a list of stock in their warehouse in the care of Edgar's broker. The statement that the B. & O. Warehouse sent in could not be reconciled with our records. There was quite a shortage involved and McGrath corresponded with the Edgar organization for a time to straighten it out but could not get very far with it. Beebe told me the shortage resulted from Edgar's merchandising activities and to bill them for it.

We received from Edgar a payment of $4,100 for the shortage in the B. & O. Warehouse in 1930.

Recross-examination.

By Mr. Rice:

The difficulty in Detroit arose when we made our audit in November, 1929. Cincinnati was not discovered until the confirmation of the stock from the warehouse in our audit of December 31, 1929. We never learned how far back the shortages went. The records were in such a confused state that it would have taken months of labor and trouble to check each and every delivery. We never found the exact dates when the original deliveries were made. We first placed stock in Detroit late in 1928 or early in January, 1929, and made an audit the following November. We did [fol. 1791] not have a stock in Cincinnati until March, 1929, and had an auditors' statement as of December 31. We never consigned stocks with Edgar prior to the dates mentioned.

[fol. 1792] EDGAR H. STONE was called as a witness on behalf of the defendants.

Direct examination.

By Mr. McGratty:

I was executive vice-president of Spreckels Sugar Corporation from the time it commenced operations in 1929 until it ceased business in 1931.

I am familiar with the testimony of Beebe in so far as the relationship between Edgar and Spreckels is concerned. I was not aware until late in 1929 that Edgar was delaying billings on sales of Spreckels' consigned stock. I was not aware that Edgar as broker was reporting sales of Spreckels' consigned stock at a date after the actual sale and at a price different from the price prevailing on the date of the actual sale. I was not aware that Edgar was selling our consigned stocks at various points and failing to report their sales until some later date when Edgar sold a corresponding amount of Spreckels' sugar which he himself owned at another point. I did not approve of any such method of handling Spreckels' stocks as has just been described. Harper of our organization did not approve of such method. To the best of my knowledge and information, neither Harper nor any other member of Spreckels authorized such method.

[fol. 1793] Late in 1929, after a trip which Ketcham of our company made to the Mid-West, he reported we were not receiving withdrawal slips from the warehouse at the time at which our sugar, subject to Edgar's order, was withdrawn. We decided to send Ketcham to Detroit to live, using that City as his headquarters solely for the purpose of watching Edgar. Our organization communicated with the various warehouses to which we had consigned sugar and asked for lists of exact dates of withdrawals. On receipt of information from the warehouses, Edgar sent very belated bills to us for such sugars. He invoiced those sugars after receipt of such information from the warehouse. He put on the invoice a latner date than that of withdrawal and the price was lower than the market at which the sugar was actually withdrawn. Edgar then furnished us with invoices covering these shortages which had been reported by the warehouses. We were willing to accept these in-

voices at the lower price because we considered it was water over the dam and further discussion would involve Edgar's customers who were more valuable to us than Edgar. Furthermore, I had set up in December 1929 sufficient preventative measures so that this improper handling of our sugar would never happen again. On that basis we accepted [fol. 1794] checks which Edgar had secured from the customers and closed that particular incident.

Ketcham remained in Detroit from December 1929 to May 1931. He made several trips from New York on the same subject just prior to December, 1929. In the latter part of 1930 the situation in connection with consigned stock was not entirely cleared up. Continued complaints came in from Ketcham at that time, to the effect that certain situations were not cleared up. He was not receiving cooperation from Beebe and a letter was received from Scovell Wellington & Company, auditors of Edgar's books. They asked me to give them a record for comparison, as to Edgar's account.

In reference to the testimony of Beebe, on pages 3593 to 3604, 3908 to 3931, 4144, 4171 and 4195 to 4200 of the Record, as to arrangements of Edgar & Son with Harper and myself, I wish to state that our instructions to Edgar, acting as broker, were:

"When you are selling our sugar you are working for us and you will take orders from us and not make yourself a self-appointed sales manager of our concern."

We instructed him he could sell sugar at a quoted price to outlying points provided that the water rate which we had paid to Detroit plus the local rate from Detroit to an [fol. 1795] outlying point did not involve an absorption of more than 5¢ per bag, comparing that sum with the prepay figure that we charged on the invoice at the outlying point.

We authorized him to sell and report sales of Spreckels sugar at outlying points where we would not take more than a 5¢ absorption, but he had no right to substitute any other sugars. There was one exception. Beebe phoned us one afternoon late in 1929 and said that he had a hurried order for bulk sugar which he would like to fill with our sugar but since ours was onthe top floor of one of the warehouses in Detroit they could not load the cars that

night and would lose the order unless he substituted Pennsylvania brand of bulk sugar. He asked our permission, indicating that he felt he was disobeying our instructions if he did not do so. Harper talked with him on the phone, discussed the matter with me in the next office and gave him that permission. Otherwise any other substitution was improper.

We authorized Edgar, when shipping bulk sugar of Spreckels from Detroit to outlying points, to include specialties of other refiners to complete the carload. We said he could include a few cartons or containers if it would help to move a quantity of our sugars. We were to pay only for [fol. 1796] the excess freight because we received the prepay on specialties too. It would be only a matter of a few cents on a carload. We never authorized the Edgar organization either to ship bulk granulated sugar of other refiners to complete a carload or to ship full carloads of other people's sugar and charge Spreckels a lower rate as though it had been our own.

We closed our refinery in the middle of August 1930 and later that year Ketcham kept reporting that there appeared to be improper substitutions for our sugars to these outlying points. In December 1930 I called Beebe and the warehouse man, Brown of Detroit Harbor Terminals, to come to New York and hold a conference on the matter.

There were present Harper, Ketcham, Brown, Beebe, one or two of Spreckels' employees and myself. The discussion lasted for several hours and became very heated at times. Ketcham's data indicated that our instructions had been disobeyed and that other sugars had been shipped. Both Harper and I accused him of acting in bad faith and demanded he tell us whether Edgar & Son had made any concealed profits on such substitutions. Beebe denied they had and Harper and I considered at that time that Ketcham's [fol. 1797] data was not sufficient to prove concealed profits. We sent him back to Detroit to complete his investigation and he remained there until May, 1931. It did prove to my mind the matter of improper substitution.

During the conference neither Harper nor I requested Ketcham to leave the room. He was present during the entire conference. Neither Harper nor I stated during the conference that the substitution of other refiners' sugar for

ours on local shipments to Detroit had been authorized. We very vigorously stated they had not been.

Cross-examination.

By Mr. Rice:

Harper, after consulting with me, entered into the arrangement with Edgar whereby he could include specialties in cars of Spreckels' sugar shipped our from Detroit. The arrangement did not provide that Edgar could report Spreckels' sugar as having been sold at some point beyond Detroit whereas, as a matter of fact, it had been sold locally in Detroit. We gave Edgar instructions that he could sell our sugars and ship them to points outside of Detroit providing that the sum of water-freight to Detroit from Yonkers and the local freight from Detroit to the outlying points would not mean an absorption of more than 5¢ per [fol. 1798] 100 pounds when compared with the prepay rate that we collected on the invoices. We were willing to suffer a 5¢ absorption over the water rate plus the local rate.

[fol. 1799] WILLIAM H. HARPER was called as a witness on behalf of the defendants.

Direct examination.

By Mr. McGratty:

I was associated with Spreckels from the time it commenced operations in 1929 until it discontinued business in 1931. I was secretary and treasurer and later vice-president and treasurer of the company.

I heard the testimony of Stone. I heard the questions asked him with reference to an arrangement regarding a plus and minus system and the substitution of sugar of other refiners, or Edgar's own sugar or beet sugar for Spreckels' own consigned stocks on shipments to outlying points from Detroit. I never entered into any such agreement with Beebe, Edgar or any member of the Edgar organization.

Prior to the receipt of these reports from the warehouses and the information received from Ketcham I was not aware that such practices were going on.

My recollection of the conference held in the latter part of 1930 coincides with the statement made by Stone.

I am familiar with the testimony of Beebe. I never entered into any agreement with Beebe or anyone else in the Edgar organization with regard to the substitution of other [fol. 1800] sugars for Spreckels' sugars for shipment except in the case that Stone mentioned, of the several thousand bags of Pennsylvania sugar which he sent out one night after obtaining permission to do so. I never entered into any arrangement with Beebe or anyone else in the Edgar organization whereby they could delay billings on sales of Spreckels' consigned stocks or sell Spreckels' consigned stocks at one point and not report the sale until some later date when Edgar sold his own sugar.

Cross-examination.

By Mr. Rice:

The first time I heard of any of the irregularities testified to was very late in 1929 and was in regard to the cases of delayed billing. I do not remember of hearing of any delayed billing on the part of the Edgar organization prior to that time. We did not find out about the situation until Ketcham dug out the information some time in 1930. The shortages were part of the delayed billings. They would have been billings latter on if we had not caught the shortages before they were billed.

After the irregularities came to the attention of Spreckels' officers we attempted to correct them though we were not entirely successful.

[fol. 1801] JOHN H. KETCHAM was called as a witness on behalf of the defendants.

Direct examination.

By Mr. McGratty:

I was connected with Spreckels from the time it commenced operations in 1929 until it ceased business May 2, 1931. In 1929 I was assistant sales manager and on December 1 of that year I was appointed western representative and sent to Detroit. I am familiar with the testimony of

Edgar and Beebe in so far as their relation with Spreckels is concerned.

Until late December, 1929, I was not aware of Edgar's practice of disposing of quantities of Spreckels' consigned stocks at various points and their failure to report sales to Spreckels until some later date when Edgar, at other points, disposed of Spreckels' sugar which he himself had purchased. I never authorized such practice and as far as I know Harper and Stone did not.

I was permanently located in Detroit in December, 1929. I went there to straighten out the records and find out where our sugar was, whether it had been disposed of or whether it even existed. At the time we had not been receiving proper information in the reports from the warehouses or [fol. 1802] from Edgar's office. In October, Detroit Harbor Terminals told me that all report for Spreckels were to be sent to Edgar and not to Spreckels. At that time our New York office had not received the warehouse receipts on a number of cargoes of 30,000 bags each of Spreckels' sugar which had been consigned to Detroit in the care of Edgar.

In the latter part of 1929 and the early part of 1930 Spreckels requested the various warehouses, where its sugar was consigned under care of Edgar as broker, to furnish Spreckels with a report showing when the sugar had been delivered. They were forwarded to me at Detroit. Upon my request Beebe eventually furnished me with invoices covering the shortages disclosed on the reports received from the warehouses.

The invoices in Exhibit D-2 were paid by Edgar's check for $72,000. The A. & P. is shown in parentheses on the cash book because the payment was applied against the invoice which went into the A. & P. ledger account.

Defendants' Exhibits D-2 to F-2, inclusive, were received in evidence.

[fol. 1803] The shortage in Chicago was discovered in January 1930. I called at the North Pier Terminal Warehouse and asked for a report of the loss of 10,000 bags that were there. They told me we had no sugar there. We had not received any reports of withdrawals on the 10,000 bags from this warehouse. I procured from the warehouse a statement purporting to show the dates on which this

sugar had actually been delivered and asked Beebe for an invoice, which he subsequently furnished, to cover it. The difference between the 10,000 bags in the warehouse and the invoice for 9,137 bags arises because some of the bags had been damaged and there was a claim pending against the transportation company. Payment of the net amount due less 2% cash discount was made March 25, 1930. That and several other items less one adjustment of $180 was wired to the National City Bank for our account on that date and the following day we received this letter with the remittance advice from W. H. Edgar & Son.

Defendants' Exhibits B-9 and W-9 to Z-9, inclusive, were received in evidence.

There were two additional shortages, one at Vincennes and a very large one at Buffalo. Late in December 1929 [fol. 1804] I returned to the East and had a conference with Linde, head of the bookkeeping department of Spreckels. He said that word had been received from Buffalo that approximately 50,000 bags of sugar supposed to be on hand there in consigned stock was not there at all. Linde and Stone asked me to take up the matter immediately so I telephoned the Keystone warehouse at Buffalo and asked someone there about these lots of sugar. This person refused to give me any information. He said it was not our sugar but Edgar's and we should hold Edgar responsible. He told me that at that time the sugar was not in the warehouse. That night we sent Bagnall to Buffalo. He obtained from the warehouse reports of the dates and quantities of deliveries and advised us that all of the sugar had been delivered. One carload had been delivered the previous May and the bulk of it during the fall of 1929. I returned to Detroit and asked Beebe for invoices, which he later supplied. I told him that there had been a shortage in Buffalo of 50,000 bags and he said he thought I was right.

Spreckels' list price of sugar in September 1929 was 5.30. It later advanced to 5.40 and later to the peak of 5.50 which was reached in October.

While I was in Detroit in 1930 I discovered that Edgar [fol. 1805] would deliver our sugar for our account in Detroit and later on or even earlier ship other brands of sugar out of Detroit to various local out-points. He would then

render us an invoice showing a freight application to such sub-points as Toledo, Grand Rapids, Battle Creek, etc., and have us pay the local freight from Detroit to such out-points. He did not report to us that the Spreckels sugar had actually been delivered at Detroit. He reported that the Spreckels sugar was delivered at these outlying points. I began to suspect what all this meant and estimated how much this practice was costing us. Had our sugar been reported to us when delivered to Detroit and invoiced on the 40.2 Detroit selling basis with the advantage of the freight pick-up of some 12¢ or 15¢ we would have been all right. As a result of Edgar's practices we were making an absorption from Yonkers to these other points of about 2¢ a bag.

I reported this information to our New York office early in December 1931 when I completed my investigation on this subject. I was present at the conference at New York testified to by Harper and Stone. My recollection of what transpired at the conference was substantially in accordance with their testimony. I was not requested by either of them at that time to leave the conference. I do not [fol. 1806] know of any arrangements between Spreckels and Edgar with reference to the method of handling Spreckels' sugar other than those described by Harper and Stone this morning.

The Spreckels "Q" is a consignment withdrawal order made up in sets of 6 in various colors by the broker. "Q" is the letter assigned to Edgar. The white copy was given to the warehouse by the broker and the warehouse was to obtain the buyer's signature for receipt of the goods or to sign the blue copy itself, certifying that delivery had been made in accordance with the specifications and forward that blue copy to New York for Spreckels' office records. The pink copy was sent by the broker to the refiner. The broker himself would retail the yellow copy. There were two other copies, one for the buyer and one for a New York broker. The dates of the Q numbers listed in Exhibit N-2 were September and October, 1929.

Q-627 shows a delivery on September 21, 1929, by Detroit Harbor Terminals to the A. & P. of 625 bags bulk granulated at Toledo and Q-628 shows a delivery on the same date of 402 bags of bulk to the same buyer at Holland, Michigan. The two "Qs" are photostatic copies

forwarded by me to the Detroit Harbor Terminals The signature appearing at the bottom is that of Leo Sullivan, [fol. 1807] the clerk at the offices of Detroit Harbor Terminals who handled the sugar stocks. Spreckels paid the local freight on shipments of these quantities of sugar to the destination point named in the two "Qs".

In almost all cases the freight bills which were forwarded by Detroit Harbor Terminals for the local shipments out of Detroit would not indicate the name of the refiner whose sugar was shipped. There were some little cases when there would be a few packages, like Edgar's "Household" brand, that would be marked "H. H.", but all the rest would show either "sugar" or "brand sugar" or "bulk sugar".

Spreckels' freight applications to Holland, Michigan, Toledo, Ohio, and Detroit, Michigan, in September and October, 1929, were 49.5, 42.3 and 40.2, respectively. The local freight rate from Detroit to Holland at that time was 25¢ and from Detroit to Toledo 16½¢.

The warehouse delivery orders in Exhibit P-2, indicate that Spreckels' sugar was delivered to W. H. Edgar & Son to space in his warehouse in Detroit. They do not show that they were Arbuckle's sugar but by tracing it it would show whose sugars they were. The lot card was opened in Edgar's name and you will find DO-103047 and just below that you will find where it actually left the [fol. 1808] warehouse for the account of Edgar. 103622 shows 100 bags delivered for the account of W. H. Edgar & Son and the Edgar signature with the truckman's signature appears on it. There are 80 bags out of lot 4017 and 220 out of lot 4018. Lot 4017 covered 800 bags opened up in the name of Edgar on September 16. Lot 4018 comes under the same description. According to the lot card in Warehouse No. 5 these two lots of 800 bags each were opened up September 3 in the name of Arbuckle. They tied up with the correct numbers. 4017 is car LM-11240 and 4018 is car Wabash 79993. The documents produced in response to subpœna No. 2 show, as stated on Exhibit N-2, that of the 625 bags that moved from Detroit to Toledo 500 were of the Arbuckle brand.

Cross-examination.

By Mr. Rice:

The Edgar organization actually stopped purchasing Spreckels' sugar from Spreckels some time after I got to Detroit on December 1, 1929. At that time they were acting as our brokers and continued in that capacity until we cleared the stock out in 1930. I believe they became our brokers in 1928. I do not recall any brokerage transactions prior to May 2, 1929.

Defendants' Exhibit A-10 was received in evidence.

[fol. 1809] JOHN W. LOWE was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Wyatt:

Defendants' Exhibit T-9 was received in evidence.

Revere carried a consigned stock in Norfolk in 1928. We abandoned it late in 1928 and were out of that market entirely during 1929. We went out in 1930, employed a broker there for a time, then went out again for a few months, employed a new broker and are now in that market. I am familiar with the circumstances under which the customer whose name appears at the bottom of Exhibit T-0 was removed from our list. We removed him because he refused to complete his contracts. I reported that to the Institute.

[fol. 1810] ARTHUR B. WOLLAN was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Higgins:

I am vice-president and treasurer of American and have been connected with that company 36 years. From 1913 to 1920 I was comptroller, from 1920 to 1929 treasurer and from that time on vice-president and treasurer.

Exhibit D-10 is a statement of the rebates and concessions given by American in 1927.

Defendants' Exhibit D-10 was received in evidence.

Exhibit E-10 sets out in the order of the customer's yearly purchases opposite the number given to each customer, the amount and character of the concession given to that customer.

Defendant's Exhibits E-10 and F-10 were marked for identification.

Deliveries to buyers who received concessions comprises 40.4% of the total deliveries to all domestic buyers. I do not mean that the full 40.4% deliveries to buyers all car- [fol. 1811] ried concessions. 38.9% of deliveries to all buyers actually carried concessions. The difference consists of deliveries to buyers who received concessions and deliveries which did not carry concessions. 10,187,325 bags actually carried concessions.

In 1929 we had 5,000 purchasers who bought less than 10,000 bags.

Exhibit G-10 is a memorandum containing the number of customers in each class. It is a correct statement of the number of customers in the class from 1 to 10,000, 10,000 to 25,000, 25,000 to 50,000, 50,000 to 100,000 and 100,000 and over.

Defendants' Exhibit G-10 was received in evidence.

On the last page of Exhibit E-10 showing the class of customers buying more than 100,000 bags per year, the figure 2 in the heading "Cartage Allowance" opposite customer 110 is the only allowance given to that customer. In that city all customers were charged 2¢ per 100 pounds for delivery. In this case the customary charge of 2¢ [fol. 1812] was refunded. Every month we went through the form of billing the customer for the 2¢ cartage allowance but later we refunded it. We paid the 2¢ and at intervals we sent him the check for the allowance. The figure 3 under the heading "Cartage Allowance", opposite customer 5 refers to a cartage allowance of 3¢ in addition to a straight price allowance of 5¢ in the first column. In that city the customers were permitted to call for their sugar if they wished and receive an allowance of 3¢ per

100. This particular customer called for his sugar and received 6¢ per 100. Therefore, we have considered the 3¢, which was an amount not received by all customers, as a special concession and discriminatory.

The 10¼¢ freight allowance opposite customer 21 as shown on the last page of Exhibit E-10 for identification, did not apply to all shipments to the customer during the year. The storage allowance and the brokerage allowance of 4½¢ applied to all deliveries but the freight allowance was only on 111,999 bags or approximately ⅛ of the total.

Opposite customer 51 there is a straight price allowance of 5¢ and a cartage allowance termed "various". The lat-
[fol. 1813] ter applied to out-of-town deliveries. I do not know the the number of bags but the amount involved was $2,388.59. The 5¢ and 9¢ on returned bags under the heading "Miscellaneous" was on a comparatively small number of bags. The 9¢ was on 3,600 bags and the 5¢ on 2,054 empty bags out of a total of 100,000. Opposite customer 55, under the heading "Miscellaneous" there is an item "Return of interest paid on notes". It refers to a customer who had the privilege of paying his invoices by 30-day trade acceptances bearing 6% interest. He used that privilege on carload lots, not on deliveries from consignment which were smaller. These trade acceptances, including interest were all paid at maturity. There were no extensions. Later the amount of interest was refunded to him.

Petitioners' Exhibit 509 was received in evidence.

The 5¢ allowance to customer 96 was the usual special allowance on a total quantity of 422,000 bags. The 5¢ per 100 on packages was only on 81,488 bags. The special guarantee allowances were on some floor stocks and amounted to 10¢ per 100 on 55,554 bags, 20¢ per 100 on 11,071 bags and 17¢ per 100 on 2,704 bags. There was a
[fol. 1814] 15¢ bag allowance to customer 60 on the return of 354 empty bags.

In the handling of the special rebates and allowances in 1927 and before, the general sales manager or vice-president in charge of sales handed a small informal memorandum to one of our accounting department, who was in a confidential capacity, indicating the names of the customers, the return or type of special allowance and the date

from which it should apply. The memorandum was not handed to accountants generally but only one or two who were in a confidential capacity. He would then advise the head of the statistical department of the name of the customer and request him to notify the accountant at the end of each period of the number of pounds that customer had received. If it was on packaged goods he only advised him of the number of pounds of packaged deliveries. Other types of allowances were similarly handled.

The accountant prepared a voucher, which is an order on our cashier to pay to the customer the money which he had calculated would be due him for this period and for the special allowance. The check would be sent to the general sales manager who in turn sent it to the customer. The [fol. 1815] papers in Exhibit H-10 are typical vouchers of the allowance I have described.

The one on the first sheet is a voucher for a single customer and a single amount of allowance. The voucher did not disclose the character of the allowance or the payment. The one on the second sheet is a voucher covering an entire group of allowances. The allowances were generally paid quarterly, though in some instances monthly. They were allowances below the contract price of the sugar and were not reflected on the face of the contracts in any way. Knowledge of them was confined to just as few people as it was reasonably possible to confine it to and carry on our business.

The second sheet is a voucher for a total of what is in the following sheets. Individual checks are all dated the same day. They are not individual checks to one customer. They are different names. We use the vouchers in place of check stubs which we do not use in our system. Instead of making individual vouchers such as the second page is made, we make one voucher with one voucher number and all payments are attached to it. It is a matter of convenience and savings in clerical work.

Cross-examination.

By Mr. Fly:

The list in Exhibit H-10 covers the quarter ending at the [fol. 1816] end of our fiscal month March. It does not cover all of our concessions in all territories during that quarter. It would cover most of them because the pay-

ments are from our New York office and most of the concessions come from there. This particular voucher did not include those paid monthly during the three months. There would be a voucher probably similar to the first sheet, voucher C-1432, for individual payment unless there were many of them. In that case there would be one voucher like this and then a list attached to it.

I have never seen one of our contract forms signed by the customer which is the contract in effect which had any indication of a 5¢ special allowance or 10¢ special allowance or cartage or storage allowance. There was nothing to indicate on the contract that the price named therein was under the published price. There is just one price named and no notation or anything else. The contract showed the price at which the sugar had been sold to the customer and if there was a special allowance such as 5¢, that would not be indicated. I did not know that there were any discounts from the regular published prices, except what we term [fol. 1817] the selling basis which frequently was lower than the list price but it was announced and publicly known. The selling basis was not the list price.

At the times we sold under list price it was what we called the selling basis. All sugar was sold on the same basis except only as individual customers received concessions below that base. Exhibit E-10 contains as complete a schedule of all discounts and allowances as I was able to obtain and I believe it is entirely complete.

There are one or two instances where an allowance was made for advertising. Whether it was an advertising allowance for the purpose of doing any advertising, I do not know but I think it was not. I think it was an allowance on packages only. Customer 96 received 5¢ a 100 on deliveries and in addition 5¢ on packages amounting to 1,488 bags. Many of these allowances were charged to sugar advertising.

We did not have many storage allowances. We had some 4 or 5 customers who were permitted to have consignments in their own warehouses but there was no payment for storage because it was for their convenience.

[fol. 1818] After the cashier has sent the payments to the sales manager for distribution, a charge is made in what we term a "cash book", one of our regular books of account, and the special allowances of 5¢ or 10¢ a 100 pounds are charged to a refined sugar account. The charge

is entered as an expense. It is deducted in ascertaining our margin. The same accountants who order the payment and calculate what it should be also calculate from their memorandum which goes into the refined sugar account the amount of the special allowances and they use that as a deduction from the refined sugar price in arriving at our net price for margin purposes.

In order to arrive at the net price the margin price allowances allowed were deducted. Expenses were not included.

[fol. 1819] PAUL M. RIPLEY recalled.

Redirect examination.

By Mr, Higgins:

I have the regular published tariff of the Bull Steamship Line which was in effect from November 1929 to late in 1930. On page 12 thereof, item 430, it provides for the rate on sugar, beet or cane, various character of packages, subject to a minimum amount, 24,000 pounds, from Baltimore to Tampa and St. Petersburg, Florida, 25½¢.

I have also supplement No. 2 effective December 15, 1930, and charging that rate. It provided for a rate of 20¢ per 100 pounds from Baltimore to Tampa and St. Petersburg.

Defendants' Exhibit I-10 was received in evidence.

American's actual freight application to St. Petersburg was 25½¢ plus tare from November 1929 until we announced on July 16, 1930 that our basis would be reduced to 20¢ plus tare. American's actual freight application of shipments and deliveries to Tampa was 25½¢ from November, 1929, until June 16, 1930, when we announced we would [fol. 1820] sell Tampa on a basis of a 20¢ plus tare. There was a period from June 16, 1930, until July 16, 1930, when there was a 5¢ difference between the freight applications to Tampa and St. Petersburg.

Our invoices indicate that we were selling St. Petersburg on the same basis as Tampa during this period. Most of the deliveries were made out of Tampa's stock and trucked across the bridge to St. Petersburg. Practically all the sugar purchased by St. Petersburg buyers was taken for delivery at Tampa and trucked by their own trucks.

Of the 79 towns listed as consignment points in Exhibit V-6, 27 were transit points under the railroad tariffs of 1930. American had consignment points in 47 of the 79 towns. Out of the 47, 20 were transit points. Out of the 20 points where we had stocks we used only Mounds and Chicago during 1930 for transiting in any quantity. We considered Clearing as a switching district of Chicago, not as a separate point.

Defendants' Exhibits J-10 and K-10 were received in evidence.

[fol. 1821] Cross-examination.

By Mr. Fly:

Referring to Exhibit 491, the forwarding of the sugar from Tampa to St. Petersburg by permitting it to remain on the steamers did not cost American any money. It was an accommodation to the St. Petersburg buyer by the Bull Line and did not defeat our selling basis at St. Petersburg. I cannot tell what Chinal had in mind when he said there was also a restriction of a free market for all refiners. I do not see how it was in any way. It did not defeat our true selling basis. I do not see any reason for all the complaint, except on the assessment of warehouse charges for sugar that did not go into the warehouse. The matter was investigated and corrected but I did not do it. The correction did not defeat our selling basis at St. Petersburg. Our selling basis on l. c. l. list at St. Petersburg was the same as it was at Tampa.

[fol. 1822] STIPULATION RE TESTIMONY

It is hereby stipulated by and between the parties by their attorneys, as follows:

Thomas J. Gallagher and Arthur Weidener, travelling auditors for the American Sugar Refining Company, if called as witnesses in this case, would testify that it was their duty and practice to audit the consigned stocks of American Sugar Refining Company and that during the period that American consigned sugar with brokers and customers they audited such consigned stocks; that upon

calling upon a broker or customer to whom sugar was consigned, in nearly all cases the broker would give the auditors Delivery from Consignment tickets made up after the auditors called, or the customer would advise the auditors of withdrawals, which the broker or the customer would say represented withdrawals made that day or the day before. In the case of customers, there would be no delivery receipts, but in the case of brokers' consignments the broker would have delivery receipts for the sugar delivered. If the date which the broker placed upon the delivery receipts corresponded with the dates placed on the Delivery from Consignment tickets, everything would appear to be regular, and the auditors would then proceed to take an actual inventory of the stock, after taking into [fol. 1823] consideration said Delivery from Consignment tickets and customers' withdrawals. If the stock then balanced, the stock would be considered correct.

If, however, the stock then remained out of balance and there was a shortage, the auditors would require Delivery from Consignment tickets to be made up forthwith covering such shortage and would report the matter to the refiner. Such shortages would mean that the sugar had been withdrawn and not reported.

If the delivery receipts, in the case of a broker's warehouse, bore earlier dates than the corresponding Delivery from Consignment tickets sent in to the refiner, it would mean that the broker was holding up billing, and where such facts were uncovered by the auditors they would report such facts to the refiner.

Thomas J. Gallagher would testify that he audited the consigned stock of broker No. 1 on May 21, 1927, and reported to the refiner concerning this audit that 250 bags of sugar were missing when the stock was checked; that the broker told him that he had loaned the 250 bags to a customer but that he had no receipt for the sugar and that the broker thereupon made up and handed to the auditor a Delivery from Consignment ticket representing said 250 bags.

[fol. 1824] Arthur Weidener would testify that on November 21, 1928, he audited the consigned stock of broker No. 1 and reported to the refiner that every lot was out of balance with the actual stock in the warehouse and that the broker was holding up billing and reporting deliveries in lots of 400 bags, whereas the actual deliveries extended over a

period of time and were in small lots, in order to avoid the service charge then prevailing upon less than carload deliveries.

Thomas J. Gallagher would testify that he aduited the consigned stock of broker No. 1 on May 24, 1926, and reported to the refiner that the broker had sold to a customer, who had no credit line with the refiner, sugar in the amount of $1,105.73, and had not reported the delivery of the sugar to the customer.

Thomas J. Gallagher would testify that he audited the consigned stock of broker No. 2 on May 8, 1926, and reported to the refiner that a delivery of 40 bags of fine granulated sugar had been made on March 23 and not reported.

Arthur Weidener would testify that he audited the consigned stock of broker No. 2 on October 18, 1926, and reported to the refiner that one lot checked short 20 bags, which sugar had been delivered to a customer on October 4 [fol. 1825] but had not been reported.

Thomas J. Gallagher would testify that he audited the consigned stock of broker No. 2 on April 23, 1928, and reported to the refiner that the stock was short 38 bags which represented deliveries to a customer which had not been reported.

Thomas J. Gallagher would testify that he audited the consigned stock of broker No. 3 in July, 1925, and checked said stock short 886 containers, 1,099 sacks, 258 bags and 2 barrels, and that upon the shortage involved, the American Sugar Refining Company collected upon the broker's bond.

Arthur Weidener would testify that he checked the consigned stock of broker No. 4 on May 21, 1928, and reported to the refiner that the stock was short 67 bags; that 21 bags had been sold for cash and no remittance made to the refiner;——

Mr. Peck: I should not—because it is not quite clear—that is an additional 21 bags, not a part of it.

that 107 bags were shown by the broker's records to have been delivered to customers who claimed that they had never received the sugar. The refiner collected upon the bond of the broker $1,109.98 on account of said sugars.

[fol. 1826] Arthur Weidener would testify that he checked the consigned stock of broker No. 5 on May 19, 1928, and reported to the refiner that the broker had delivered but not

reported 199 bags of sugar and that the signed delivery tickets showed that some of the sugar was delivered as far back as May 2.

Thomas J. Gallagher would testify that he audited the consigned stock of broker No. 6 on November 1, 1928, and reported to the refiner that in the case of various customers the broker was delaying the reports of withdrawals from a week to three weeks and reported deliveries only in carload lots, whereas the sugar was actually withdrawn in less than carload lots, in order to avoid the service charge on less than carload lots, in order to avoid the service charge on less than carload deliveries.

Arthur Weidener would testify that he checked the consigned stock of broker No. 7 on May 9, 1928, and reported to the refiner that in the case of several customers the broker was delaying the reports of withdrawals up to 25 days.

Arthur Weidener would testify that he checked the consigned stock of broker No. 8 on May 8, 1928, and reported to the refiner that the broker was delaying reports of withdrawals.

Arthur Weidener would testify that he checked the consigned stock of broker No. 9 on April 28, 1928, and reported [fol. 1827] to the refiner that said broker was delaying reports of withdrawals from 10 to 15 days.

Thomas J. Gallagher would testify that he audited the consigned stock of broker No. 10 on April 3, 1928, and reported to the refiner that the stock checked short 244 bags, 85 containers, 49 sacks but that the broker was able to make up delivery from consignment tickets on account of deliveries theretofore made but not reported for all but 45 bags and 49 sacks, which the broker could not account for and paid for with his personal check for $581.28.

That both Arthur Weidener and Thomas J. Gallagher would testify that they reported to the refiner that they were unable to count the stock consigned to the warehouse of customer A because the stock was located in numerous branch stores of the customer.

That Arthur Weidener would testify that he checked the consigned stock of customer B on May 8, 1926, and reported to the refiner that he found the stock short 200 bags, representing withdrawals made and not reported.

That Thomas J. Gallagher would testify that he reported to the refiner on March 28, 1927, that he was unable to count

the stock consigned to customer C because the stock had been distributed to various branch plants of the customer. [fol. 1828] That Thomas J. Gallagher would testify that he audited the consigned stock of customer D on May 19, 1926, and reported to the refiner that such stock checked short approximately 2,500 bags, representing withdrawals made and not reported.

That Thomas J. Gallagher would testify that he audited the consigned stock of customer E on April 28, 1927, and found that withdrawals had been made and not reported in the amount of 100 bags.

That Arthur Weidener would testify that he visited the premises of customer F on June 21, 1926, and reported to the refiner that he could not count the stock because it was piled in with other grocery lines and mingled with the stock of the customer.

That Thomas J. Gallagher would testify that he audited the stock of customer G at its four branches and reported to the refiner that the stock checked short 1,800 bags at one branch, 1,800 bags at another branch, 600 bags at a third branch and 600 bags at a fourth branch, representing withdrawals made and not reported.

STIPULATION RE TESTIMONY

That Charles B. Castle and Samuel Kerwin would testify that, while it was not National's practice to audit its stock consigned with customers, during the years 1925, 1926 and 1927 they audited the consigned stocks of the National Su- [fol. 1829] gar Refining Company stored with some of National's customers at points where public consignments were also maintained; that they reported to the refiner that the stock of customer No. 1 checked short on April 23, 1925, 146 bags, March 25, 1926, 421 bags, and on October 15, 1926; that the stock of customer No. 2 checked short on April 23, 1925, 61 bags, and on October 15, 1926; that the stock of customer No. 3 checked short on April 21, 1925; that the stock of customer No. 4 checked short on April 20, 1926, and November 27, 1926; that the stock of customer No. 5 checked short on April 27, 1926, 646 bags, and on November 27, 1926; that the stock of customer No. 6 checked short on November 27, 1926; that the stock of cus-

tomers No. 7, No. 8 and No. 9 checked short on September 21, 1927; all of said shortages representing withdrawals made and not reported.

All of said auditors would testify that it was their duty to see that the warehouse stocks were properly handled and that withdrawals were promptly reported and that in cases where they found the delayed reporting of withdrawals they advised the customer or broker that such practices would not be tolerated and that all withdrawals would have to be reported promptly.

The foregoing is admitted in evidence solely upon the issue of the good faith of defendants.

[fol. 1830] The following Defendants' Exhibits were received in evidence:

Exs. N-10 to Q-10, inclusive.
" M-10.
" R-10 to V-10, inclusive.
" W-10 to Z-10, inclusive.
" A-11 and B-11.
" C-11 to G-11, inclusive.
" H-11 to L-11, inclusive.
" M-11 to P-11, inclusive.
" Q-11 to V-11, inclusive.
" W-11 to Z-11, inclusive.
" A-12 and B-12.
" C-12 to G-12, inclusive.
" H-12 to M-12, inclusive.
" N-12 to R-12, inclusive.
" S-12 to W-12, inclusive.
" X-12.
" Y-12 and Z-12.
" A-13 and B-13.
" C-13 to G-13, inclusive
" H-13 to K-13, inclusive.
" L-13 to P-13, inclusive.
" Q-13 to U-13, inclusive.
" V-13 to Z-13, inclusive.
" A-14.
" B-14 to F-14, inclusive.
" G-14 to L-14, inclusive.
" M-14.
" N-14 to R-14, inclusive.
" S-14 to V-14, inclusive.

[fol. 1831] STIPULATION OF TESTIMONY

It is hereby stipulated and agreed by and between counsel for the Petitioner and counsel for the Defendants as follows:

It shall be deemed that a duly qualified representative of each of the fifteen defendant refiners has been called to the stand and that he has testified as follows:

1. That all of the statistics currently furnished by such refiner to the Institute throughout its history and the statistics for prior periods furnished to the Institute in 1928 were taken from such refiner's books and records regularly kept in the ordinary course of business and are correct and accurate.

2. That the figures contained in the particular statistical exhibits now offered for such refiner, dealing with total weekly stocks of refined sugar for the year 1926, total weekly deliveries of refined sugars for the years 1926 and 1927, daily sales of refined sugar for the period from 1926 to 1931 inclusive, or a part thereof, stocks of raw sugar by weeks for the period from 1926 to 1928 inclusive, deliveries against large contracts, and monthly deliveries to the twelve largest customers and deliveries to all customers, or such of said exhibits as may be offered for the partic-
[fol. 1832] ular refiner, were taken from such refiner's books and records regularly kept in the ordinary course of business and are correct and accurate.

3. That the table now offered for such refiner showing the capacity of its refinery or refineries correctly and accurately shows the daily melting capacity of such refiner operating on a twenty-four hour day for the years therein specified.

4. That the margin table now offered for such refiner has been properly computed upon the general basis hereafter set forth, subject only to any exceptions hereafter mentioned, upon the basis of figures taken from the books and records of the refiner regularly kept in the ordinary course of business and is correct and accurate.

The general basis of computation of such margin table and the exceptions thereto are as follows:

Margin Table

General Basis of Computation

The raw sugar figures in this table show, in cents per pound of raw sugar, the average weighted price paid for raw sugar melted during the year, taken on a 96 degree basis delivered at the refinery and include all such costs or expenses as sampling, weighing, customs house expenses, storage, lighterage and demurrage. The loss in conversion, [fol. 1833] that is, the loss of approximately seven pounds of raw sugar on each one hundred pounds of refined produced is not reflected.

The refined sugar figures represent, in cents per pound of refined sugar, the average weighted price received on all deliveries of refined sugar on a granulated basis (100 pound bag), i. e. grade and package differentials not being reflected. In computing this refined sales price figure, all discounts, special allowances (including concessions where any were given) and the net freight absorption have been deducted (net freight gain having been added where there was a net gain instead of a net absorption). No expenses except the freight absorption were deducted.

The average net margin is the difference between the raw sugar figure and the refined sugar figure for each of the years 1925 to 1931, inclusive.

Each refiner followed the same method for all years. The general basis of computation has been used by all refiners in all years except in the following cases, in which the divergencies in method were as follows:

Arbuckle Brothers:

Instead of using all refined sugar sold and then adjusting so as not to reflect grade and package differentials, only [fol. 1834] the bulk granulated sugar which was sold was used in computing the refined sugar figure.

California and Hawaiian Sugar Refining Corporation:

In computing the raw sugar figure the raw sugar purchased was used instead of raw sugar melted, no adjustment for inventory having been made.

Colonial Sugars Company:

This refiner, in computing the raw sugar figure used the actual test of the sugar and did not reduce it to the 96 degree basis and also did not make the adjustment to eliminate grade and package differentials.

Godchaux Sugars, Inc.:

In computing the refined sugar figures, this refiner made no adjustment to eliminate grade and package differentials, and the only concessions deducted were those given in the form of straight price rebates.

Imperial Sugar Company:

This refiner did not make any adjustment for grade and package differentials; and reduced all soft sugars to a granulated sucrose contents basis.

W. J. McCahan Sugar Refining & Molasses Co.:

Expenses of sampling, weighing and customs house expenses were not added in computing the raw sugar figures.

[fol. 1835] Pennsylvania Sugar Company:

This refiner did not include in the computation of raw sugar figures expenses such as sampling, weighing, customs house expenses, storage, lighterage and demurrage. In computing the refined sugar figure all soft sugar sold was reduced to a granulated sucrose contents basis.

Revere Sugar Refinery:

Since most of the raw sugar used by this refiner was furnished by the United Fruit Company, the parent corporation, under special arrangements, the actual raw sugar figures of the refiner were not used. The raw sugar figures actually used are the average weighted prices paid by the American Sugar Refining Company on raw sugar melted at its Boston refinery taken on a 96 degree basis delivered at the Boston refinery.

Savannah Sugar Refining Company:

This refiner in computing the refined sugar figures did not deduct any concessions.

Spreckels Sugar Corporation (and predecessor company):

This refiner did not include, in computing the raw sugar figures, any expenses for sampling, customs house, storage, lighterage and demurrage. In computing the refined sugar figures the only concessions deducted were those given in the form of straight price allowances.

[fol. 1836] Western Sugar Refinery:

This refiner, in computing the raw sugar figures, used the raw sugar purchased instead of raw sugar melted. In the refined sugar figures there was no adjustment for grade and package differentials.

5. That the freight absorption table now offered for such refiner has been properly computed upon the general basis herein described, subject only to any exceptions hereafter mentioned, upon the basis of figures taken from such refiner's books and records regularly kept in the ordinary course of business and is correct and accurate.

The general basis of computation of the freight absorption table and the exceptions thereto are as follows:

Freight Absorptions

The statement shows for the calendar years 1926 to 1931, inclusive, the total net freight absorption of the refiner on refined sugar, i. e. the excess of the freight paid by the refiner over the amount recovered from the customers for freight on refined sugar. Where the amount recovered exceeded the amount paid (as was true in the case of some refiners for some years) there was a net gain for the year. [fol. 1837] The figures cover only freight and do not take in any storage or handling charges, or local cartage expense within refinery metropolitan areas.

In the case of four refiners, figures were estimated in part, as follows:

William Henderson:

The refiner had never kept any freight absorption account. Its figures were computed as follows: the sales invoices for the entire period were examined and the gain or loss on the individual shipments determined by comparing the freight rate paid by the refiner to the carrier with

the freight application invoiced the customer. The total absorption or gain on the shipment was then obtained by multiplying the number of pounds shipped by the difference in rates so obtained. The net total of these amounts was then computed to arrive at the total net absorption for the year.

The W. J. McCahan Sugar Refining & Molasses Co.:

This refiner's freight absorption figures are partly estimated as no freight absorption account was kept prior to June, 1927, since the absorptions prior to that date were negligible.

In 1926 there was a freight gain of $8,608.17 on shipments by private chartered vessels; to this was added a [fol. 1838] further gain of $1,000 which was estimated in the following manner: from December 1, 1920, McCahan kept a freight prepaid account, and no attempt was made to keep this account on a yearly basis. As a result, when the account was closed on December 31, 1928, it showed an accumulated net freight gain of $7,297.01 for the eight year period. It being impossible to break up this gain by years $1,000 of it has been allocated to each of the years 1926, 1927 and 1928, for the purpose of computing these figures. From this total gain of $9,608.17 for the year 1926, there was deducted $812.33, McCahan's total absorptions during the year, which was charged to a "freight account" at the time of paying the carrier.

In 1927, prior to June 1st, when McCahan started its regular freight absorption account, the "freight account" showed total freight loss of $355.62, to this was added $12,847.26, which was the absorption shown in the freight absorption account for the period from June 1st to December 31st. From this total of $13,202.88 was deducted $1,000 estimated gain, on the basis explained above.

In 1928 the freight absorption account was used throughout the year, but the estimated gain of $1,000, arrived at on the basis described above, was deducted to arrive at the [fol. 1839] final figure shown in the table.

In 1929, the freight absorption account showed total net losses of $56,837.33, to which was added $5,197.04, being adjustments for miscellaneous absorption and gains carried

in subsidiary accounts, to give the total figure of $62,034.37 for the year.

In 1930, the freight absorption account showed total net losses of $38,472.16, which was reduced to $36,972.16 by deducting $1,500 of miscellaneous gains taken from the freight prepaid account.

In 1931, the freight absorption account showed total net losses of $155,083.10, but this did not give full effect to motor ship operations in that year, which were also handled in a "motor ship account." After adjusting for this, and deducting miscellaneous gains from the freight prepaid account, the net freight absorption for the year was reduced to $120,875.65.

The National Sugar Refining Company:

During the years 1926-1929 this refiner did not keep any record of its freight absorption. The figures given on the table were estimated in the following manner: A delivered sales summary, which is kept as part of the records of the [fol. 1840] company, shows two weighted average sales prices on a 100 lb. granulated bag basis. One of these weighted average sales prices reflects the "sales contract price," which is the basis price before any allowance or freight absorptions have been deducted. The other weighted average sales price reflects a "recovery" price, that is, what was actually received from the customer, which includes whatever part of the freight charges the customer paid. The so-called "recovery price" has been deducted from the "sales contract price," after the amount of freight actually paid by National has been added to this latter figure. From this remainder, representing freight absorption and allowance, there has been deducted the average rate of all allowances. The result is taken as the estimated average freight absorption per 100-pound bag of refined sugar delivered. This, multiplied by the actual pounds delivered during the year, is taken as the freight absorption as shown in the table, for that particular year.

During the years 1930 and 1931 freight absorptions were recorded currently in the following manner: The difference between the freight rate paid by the refiner and the freight application charged the customer was currently calculated on each delivery and totaled for the year.

[fol. 1841] There has been added to the freight absorption figures for each year, as so determined, the net loss on lighterage for the year in moving sugar from the refinery to the points where it was turned over to the carriers for shipment.

Western Sugar Refinery:

For the years 1926 and 1927 there were no records kept to show the small freight absorption on deliveries in western or intermediate territories. The estimate of this absorption for these two years was made by taking the freight absorption per bag for the year 1928 on all deliveries made in western and intermediate territories and applying that rate to all deliveries in 1926 and 1927 in those territories, which were not on an f. o. b. refinery basis.

The actual amount of absorption estimated in this manner is small as compared with this refiner's total freight absorption. In 1926 out of a total freight absorption of $460,254.22 the part estimated amounts to only $2,906.09. In 1927 out of a total absorption of $361,010.63 the amount estimated is only $2,856.47. The accuracy of these estimates is substantiated by the 1928 and 1929 freight absorption figures for deliveries in western and intermediate territories which are not estimated but are the result of the regular freight abosorption account; since in 1928 the ab-
[fol. 1842] sorption in these territories was $2,976.28 and in 1929 $2,938.93.

[fol. 1843] Evan T. Fisher, recalled.

Direct examination.

By Mr. Browning:

The figures in Exhibits W-14 to H-16, inclusive, are based upon the reports furnished periodically to the Institute by members and in some instances are based upon special figures which have been placed in evidence. Wholesale prices are not included in the statistics, because we could not find any.

The following Defendants' Exhibits were received in evidence:

I-16	Y-14
T-2	Z-14
I-3	A-15
H-2	B-15 to G-15, inc.
H-10	H-15 to Y-15, inc.
M-16	Z-15 to H-16, inc.
J-16	N-16 to B-17, inc.
K-16	U-8
L-16	C-17
W-14	D-17
X-14	E-17

[fol. 1844] STIPULATION RE EXHIBIT "E-17"

Petitioner's and Defendants' counsel stipulated as follows in regard to Exhibit E-17:

"It is hereby stipulated by and between the parties by their attorneys as follows;

It shall be deemed that a duly qualified representative of each of the fifteen defendant refiners has been called to the stand and that he has testified as follows:

1. That the figures contained in the summarized balance sheets, profit and loss statements and accompanying sheets, if any, now offered for such refiner are taken from the books of account of such refiner kept in regular course of business and are correct and accurate.

2. That the segregation of assets into total capital employed for refining and other assets has been correctly made.

3. That the assets in the summarized balance sheets are taken at the book figures, which represent cost in the case of fixed assets and cost or market, whichever is lower, in the case of current assets."

The foregoing stipulation was entered into with the understanding that counsel point out additional facts which were also to be stipulated.

Mr. Browning: The refineries carry these fixed assets on their books at cost and the depreciation reserves are shown separately.

Mr. Fly: We have not stipulated the profit and loss and balance statements and the Deloitte work in all those, except insofar as we arrived at an agreement as to the facts, which we will point out.

[fol. 1845]

American

Mr. Browning: With regard to American's statement, the total capital employed for refining in the individual statements includes the $7,000,000 estimated value of the New Jersey properties for all years. The Jersey City property was originally a refinery of American's. The property is still owned but it has been permanently abandoned as a refinery. The $7,000,000 is included in the refinery assets but is not taken into the account in the Deloitte summary.

American's real estate assets are listed at about four times the tax assessed values. Those figures represent costs against which there is a depreciation reserve.

Mr. Fly: We do not concede that.

Mr. Browning: The fixed assets of American are presented in a lump sum and are not broken down.

Mr. Fly: American's freight application figures do not include 1925 but do include 1931.

Arbuckle Brothers' Timberlands

Mr. Browning: The property and plant account includes certain timberlands in Virginia and North Carolina. These timberlands were originally purchased at a cost of $552,362.63 to insure a supply of wood for barrels. The timberlands were utilized together with the barrel factory for the [fol. 1846] manufacture of barrels up to 1924. By 1924 the quantity of sugar sold in barrels had fallen to such a small amount that Arbuckle decided to dispose of the barrel factory.

The timberlands not being used since 1924, the expenses relating to the timberlands consisting of taxes, watchmen's wages, etc., have been added to the book value of the lands and are not charged in the Summarized Profit and Loss Statement.

In 1930 part of the lands was sold and realized about $125,000. It is proposed to sell the remaining lands when an opportunity presents itself. The barrel factory was sold in 1927 after using part of the wood which remained on hand. After the barrel factory was closed, such barrels as were required by Arbuckle were purchased from the Brooklyn Cooperage Company.

The timberlands have not been deducted as an element of the property and plant account; they are part of the refinery assets. The present net figure represents their value less sales which began in 1926. The statement points out the expenses of maintaining them, which are added to the capital value.

Mr. Fly: They are carried at valuations as follows: $552,000 was the cost of acquisition; the 1925 figure was [fol. 1847] $692,000; and the 1931 figure was $608,000. These properties have not been used in connection with the refining business since the early part of 1924. The Arbuckle net working capital is based upon an estimate.

Mr. Browning: On the basis stated in the statement itself, which shows how it was estimated and why.

C. & H.

Mr. Fly: C. & H. did not present a breakdown of their costs of raws. Their assets include expenses of the Village of Crockett, California, which is composed of the businesses and buildings that ordinarily go to make up a complete village.

Mr. Browning: The petitioner waived the breakdown by C. & H. of raw figures because of the physical impossibility of securing them within the time allotted.

Crockett is a one-industry town. It consists of the C. & H. refineries and since it is far away from everything they have a village for their employees. The income from the rentals which they charge their employees is first taken in in the income. Those properties have been put in the C. & H. because we consider them an essential part of their refining equipment.

[fol. 1848] Colonial

Mr. Fly: Colonial is a wholly owned subsidiary of Cuban American which produces raw sugars in America. Colonial buys its raws from Cuban American.

Godchaux

Mr. Browning: With reference to Godchaux, the breakdown of the fixed assets account obtained showed that the company had included certain real estate plants which are almost exclusively connected with their raw sugar business but which are physically connected with their refining business. We do not agree with that inclusion ourselves and have eliminated those items, amounting to approximately $1,790,000 of capital, in the revised Godchaux statement. These assets are raw sugar plantations.

Henderson

Mr. Browning: Henderson was unable in the time available to verify its raw sugar figure in the margin table, and for that reason the Henderson raw sugar figures in its margin table are to be taken as estimates only.

Imperial

Mr. Browning: In the Imperial Statement the breakdown showed they had included a cotton gin which we felt [fol. 1849] should be taken out and the individual statement has been rewritten to accomplish that.

McCahan

Mr. Browning: Included in the McCahan statement which showed assets of $6,000,000 was the value of a fringe of shacks around the property. The company said they were worth $20,000 and I raised it to $30,000. We have not bothered to rewrite the McCahan statement because of that $20,000 or $30,000 item.

National

Mr. Browning: The National Refinery at Yonkers has been operated every year from 1900 to 1930 inclusive, with annual shut-downs of greater or less duration depending on conditions in the trade and the demand for sugar. These shut-downs have varied from a minimum of six days in 1920 to 138½ days in 1923. In 1931 the National Refinery was not operated, and it has not been operated in 1932 to date because of the abnormal decline in the consumption of sugar. Increasing importations of foreign white sugar

from Cuba have also affected the distribution of the domestic refiners. A change in either the trend of domestic consumption or in the tariff on refined sugar, for which an application is now pending before the United States [fol. 1850] Tariff Commission, would undoubtedly make the operation of the National Refinery necessary.

It has always been the policy of the company to maintain the National refinery in the most efficient operating condition and to this end expenditures have been made each year through 1931. Advantage has been taken of the recent shut-down to overhaul a considerable part of the machinery and the refinery is ready to begin operations at any time. Adequate supplies, including a complete supply of boneblack in filters, have been kept on hand.

During the recent shut-down of the refinery the plant has been made use of as a distributing point for refined sugars to Westchester County and other points in New York State and southern Connecticut. The sugars are trucked from the Long Island City and Edgewater plants to Yonkers and trans-shipments made from there as required. From 1200 to 2000 bags per day are handled in this manner. In regard to the manufacturing costs of $300,000, $205,000 of those are for labor at the plant.

Pennsylvania

Mr. Fly: The value of Pennsylvania's alcohol plant has been eliminated from the 1924 and 1925 figures.

[fol. 1851]

Revere

Mr. Browning: Revere is a wholly owned subsidiary of the United Fruit Company, a raw sugar producer. We have redone the Revere individual statement because of an error in the computation. The Revere raw sugar figures in its individual statement are estimated. Because of the fact that it is a subsidiary of the United Fruit we took American's raw sugar costs for its Boston refinery and substituted them for Revere's.

Savannah

Mr. Browning: Savannah's figures included their houses for employees. They have some boarding houses, which they call hotels for employees. Those are included in the

property and plant account but the total value of those is estimated not to exceed $120,000. No breakdown of Savannah assets has been obtained.

Spreckels

Mr. Browning: The figures for Spreckels were taken from income tax returns. There was a reduction of $85,000 in capital in 1925 because of a loss.

Mr. Fly: There are no freight application figures with Spreckels.

[fol. 1852]

Texas City

Mr. Browning: The Texas City statement, as originally written, had a change during the period which, when we found it out on the breakdown, we thought should be eliminated. The new company, when it was organized in 1929, took over the charges of the predecessor company at an increased valuation of around $1,000,000. We eliminated that.

The company is not operating at the present time. The refinery closed down at the end of 1931 and has not engaged in business since except to liquidate the stock of sugars on hand. A receiver was appointed July 29, 1932, the company having previously defaulted on the payment of interest on its outstanding bond issue. The predecessor company also went into receivership May 24, 1928, after defaulting on its bond interest. There was a reorganization at that time with the result of which the present company was organized February 22, 1929. The preferred and common stockholders of the predecessors were wiped out from the reorganization plan of 1929 and the bondholders bought in the property on the foreclosure sale. Texas started in 1924. American did not build the plant but operated it in 1926, 1927 and 1928. It went into receivership May 24, 1928, while American was operating it. Ameri-
[fol. 1853] can did not operate the company from 1924 to 1926.

Mr. Carpenter: In the first year of operations Texas City tolled the sugar for American and during the last 2 years it was a joint arrangement but the operation of the refinery was solely within the control of Texas.

Western.

Mr. Fly: For obvious reasons of physical difficulties we did not get figures as to Western. They, like C. & H., have a special arrangement with the growers.

Mr. Browning: The dates of the original construction of the Defendants' refineries are as follows:

American:	Boston, 1859. Brooklyn, 1861, 1865, 1877. Combination of 7 refineries. Philadelphia, 1889. Baltimore, 1922. Chalmette, Louisiana, 1909.
Arbuckle:	Brooklyn, 1898.
C. & H.:	Crockett, California, 1905.
Colonial:	Gramercy, Louisiana, 1901.
Godchaux:	Reserve, Louisiana, 1909.
Henderson:	New Orleans, 1894.
Imperial:	Sugarland, Texas, 1889.
McCahan:	Philadelphia, 1893.
[fol. 1854]	
National:	Yonkers, 1893. Edgewater, 1905. Long Island City, 1898.
Pennsylvania:	Philadelphia, 1901.
Revere:	Charlestown, Massachusetts, 1917.
Savannah:	Port Wentworth, Georgia, 1917.
Spreckels:	Yonkers, New York, 1904.
Texas City:	Texas City, Texas, 1924.
Western:	San Francisco, 1881.

The capacity of the refineries has been tremendously changed since the original construction.

Mr. Fly: The petitioner will put in evidence all of the breakdown figures that have been submitted. We have

made comments largely on items and the stipulation covering those items relate largely to items that did not appear upon the face of the figures.

The various changes that have been made in the figures during this time, we do not concede in any way to reflect upon methods of Deloitte, Plender, Griffiths & Co. The corrections that were made have resulted from such inaccuracies as were contained in the figures submitted by the companies themselves.

[fol. 1855] EDWIN R. A. SELIGMAN was called as a witness on behalf of the Defendants.

Direct examination.

By Mr. Higgins:

I was made Professor of Political Economy at Columbia University in 1887, became McVickar Professor of Political Economy there in 1904, and retired from active service in 1930, being now McVickar Professor Emeritus of Political Economy in residence at Columbia University.

I have written some dozen books on various branches of the science of political economy including The Principles of Economics, Essays in Economics, Essays in Taxation, Studies in Public Finance, The Economic Interpretation of History, The Eonomics of Installment Selling, The Economics of Farm Relief, Price Cutting and Maintenance, together with a number of other books on various economic subjects. Most of these books have been translated into many foreign languages.

I have received various honors and distinctions for my scientific work on economic questions, among them the degree of Doctor of Laws, and have served as president of the American Economics Association, the National Tax Association and of the American Association of University Professors.

[fol. 1856] Abroad I have been a member of the French Institute and a member of the academies of political science of the leading European countries, receiving honorary degrees from a number of foreign universities, including the Universities of Paris, Heidelberg, Havana, and so forth, and have been for several decades the American

representative of the Royal British Economic Society. I have also received from the Belgium Academy the prize awarded over five years to the economist who has done the most distinguished work in the interval. I am the one American to have received that award.

I have at various times served in special capacities related to economic subjects. I have so served the city and state governments here and a number of states of the Union as well as our Federal Government. In 1922 I was expert to the Committee on Economics and Finance of the League of Nations.

I have given special thought and study to the question of competition as that is probably the central point of all modern economic science, and to the question of value under conditions of competition. In my Principles of Economics I devoted a special chapter to the theory of competition. In my book on the Shifting and Incidents of [fol. 1857] Taxation I had occasion to go rather fully into competitive as against concerted or monopolistic action so far as business was concerned and the effects of taxation upon such conditions. Then in a later work on Price Cutting and Price Maintenance the problem there was almost wholly that of what really constitutes true or fair competition. Finally I might say that for several years I have been engaged upon a larger work on this whole subject of what really is economic competition.

I have read the Code of Ethics of the Sugar Institute and am aware that the Code provides that all discrimination between customers should be abolished and that sugar should be sold only upon open prices and terms publicly announced.

I am aware that Paragraph 2 of the Code condemns quantity discounts in the sugar refining industry as unsound and discriminatory.

I am aware that Paragraph 3 of the Code condemns as discriminatory certain competitive practices, such as variations from open and publicly announced terms by way of special discounts and allowances for brokerage and storage, condemns brokerage for the benefit of the customer, special services to the customer without charge therefor, and other trade practices.

[fol. 1858] I should say that uniformity is compatible with conditions both of monopoly and of competition, but that the uniformity of price and the conditions of standard arti-

cles sold in the market by different individuals at the same time and place is entirely compatible with conditions of free competition, as the economist uses the term and in the sense in which he ordinarily considers it beneficial. When I say that uniformity of price is compatible with conditions of free or economic competition I do not imply that such free or economic competition would be restricted or rendered imperfect because the refiners refrained from the practices condemned in the Code. On the contrary, I should believe that for the competitors to refrain from the practices mentioned, namely, those of discriminatory and secret concessions and allowances, would tend and predispose toward the more complete working out of the theory of competition as understood by economists.

In the case of economic competition as distinguished from brute competition, the unsuccessful competitor does not die, nor is it necessary that he should disappear from the scene. The unsuccessful competitor in a general market may still [fol. 1859] remain, but he may lose some of the market and he will make less profits than the successful competitor. Even if the unsuccessful competitor is compelled to disappear from the scene he simply transfers himself, his capital and his activity to some other field where perhaps he may be better suited to the conditions and may be very successful.

Fundamentally I should say economic competition differs entirely from brute rivalry or competition in that it is constructive rather than destructive. In economic competition we have constructive action for the consumer, and we maintain the future competition of the other competitor or producer.

By "economic competition" I mean true competition as over against the pseudo-competition or false competition which is represented by brute rivalry. I have in fact attempted to put that into fuller and clearer language in a recent book, "Price Cutting and Price Maintenance," published in 1932 in collaboration with Professor Love.

Now, competition is carried on not only between the sellers as a whole, as against the buyers as a whole, but is also carried on among all of the sellers, each of whom wants [fol. 1860] to dispose of all of his own product, and is carried among all of the buyers, each of whom desires to secure what he needs at the lowest possible price.

As a result of this mutual interaction of forces in the competitive market where different sellers or producers have different costs of production, and might be willing to sell at different prices, and in the face of competition among the buyers who differ from each other both in the intensity of each one's demand, and also in the amount of wealth that each one has, there will always be in the competitive market for a uniform article at a given time and place, one single price, and at that single price more buyers will secure articles than would otherwise be possible, and at that single price more producers will be able to sell the article than at any other price.

The beneficial result of economic competition is that the consumers as a whole will get the article they desire at the lowest possible price, and that the producers, as a whole, will be able to remain in the business and exercise their activities and faculties and make a living.

[fol. 1861] By "demand" economists always mean the so-called effective demand, the demand of those who want an article and are willing to pay for a certain quantity of that article. In the face of such an effective demand, one individual will not, if there be open and free competition, pay any more than anybody else. At the same time, since the producers differ in abilities and opportunities, having different costs, there will always be a tendency in the long run for the lower cost producer gradually to drive the higher cost producer out of the market, or to capture more of the market. This means that while at any given time in a competitive market the price will always be at the point of highest cost, or maximum cost, in the long run and under normal conditions there will always be a tendency for the price of continuously produced articles to move in the direction of the lower or lowest cost. Consequently, in the long run, the price charged will be the lowest price compatible with the retention in the particular business of as many different cost producers as are needed to supply the article that is demanded by the purchasers.

At any given time, in a market where a large part of the total supply is disposed of, it does not necessarily follow that the lowest cost producer in that particular market will [fol. 1862] drive the highest cost producer out. On the contrary, the price is fixed at the cost of the highest cost producer who remains in the market. No competitor will

sell at a lower price than he has to sell for, and if the market price is 50¢ he would be very foolish to sell at 45¢ or 40¢. If he were to sell at 45¢ or 40¢, he could only do this by supplying more of the commodity, but with every increase in the amount that he supplies or produces, he has a correspondingly increased cost.

It is simply a question of choice between selling a fixed number of commodities at a high price or an increased number of commodities at a lower price. Naturally, every individual will choose to sell at the highest price and therefore, in the competitive market the price will be fixed at the point of the highest cost producer, and the lower cost producer will have at the time no effect upon the situation. Another reason why the lower cost producer would not seek to undercut the highest cost producer, is because of the existence of the peak load. Every producer must be prepared for this fullest capacity of his plant at the peak load, and if he were to try during the off-peak load to sell in competition in the market at a lower price, he would [fol. 1863] soon find that he was not making, but losing money thereby.

As a result of these two factors and possibly of other factors, I should say that in a given market at a particular time the lowest cost producer will not drive the highest cost producer out of the market, but there will be simply one price which will afford the lowest cost producer greater profits than obtained by the highest cost producer whose supply is necessary in order to supply the entire demand.

When we speak of a uniform price in a market we mean a price for commodities which are sold under the same conditions and with the same service. Macy and other department stores sell their commodities under different conditions. They sell only for cash. The so-called cash-and-carry stores do not even deliver. When you are dealing with Macy, as compared with others, you are dealing with, say a First Avenue store perhaps as compared with a Fifth Avenue store, where the articles sold seem to be the same but are not of the same uniform quality, or sold under the same conditions. You are dealing with two separate markets and not with the same competitive market to which I have been alluding.

[fol. 1864] The same thing is true in the sugar industry. There has often been a discrepancy of price as between

various competitors or sellers because of a difference either in the services that they are giving or the quality of the goods. In all those cases, you do not have the competitive market where a un-from article is sold at the same time and place under the same conditions.

In a true competitive market there can only be a single price. The fact that there are different prices shows that you have not a true competitive article to deal with, and that one of the explanations of this discrepancy may be of the kind that I have mentioned.

I have had a search and collection of economic authorities made to learn what economists, regarded as authorities and of standing in that science, have said about the question of one price and one market at one time. Exhibit G-17 is a collection of such statements from 20 odd economists, all bearing out the statements which I have made.

Defendants' Exhibit G-17 was received in evidence.

It is the teaching of economic science that by competition [fol. 1865] is meant such a knowledge of and open practice by all the competitors as would render impossible the existence of secret practices or concealed price discriminations.

It is a universal and uncontradicted opinion of all economic authorities that by economic competition we mean open competition.

Defendants' Exhibits H-17 and I-17 were received in evidence.

If some purchasers would be willing to pay 60¢ or 70¢ for a commodity, the more openly they know that another purchaser will pay only 50¢, the more obvious it is that they will be ready to pay only 50¢.

In the same way with reference to the sellers: if the high-cost producer, being the marginal producer, is willing to sell at 50¢ and some infra-marginal producer who could produce at lower cost, might be willing in a pinch to sell at 45¢ or 40¢, the infra-marginal producer, knowing that the marginal producer will sell only for 50¢, will naturally demand the higher price, namely 50¢. In other words, the closer we get to the openness of the market, the truer it is that the equilibrium between demand and supply will be fixed at that definite point.

[fol. 1866] It would not be to the interest of the low cost producer to sell at less than 50¢ because when he comes into the market with a definite supply and can get 50¢ for the whole of his supply since all of the supply of all of the producers is at that time in the market, he would be stupid to sell a greater quantity at less because the production of the greater quantity would imply additional expenses to him. If, he can make more money by selling the supply which he presents in the market at 50¢, he will do so. If he should find it by any chance to his interest to sell more commodities at the smaller price, then the very conditions of the problem would no longer be present and there would no longer be any economic competition in the beneficial sense of the term.

If some sold at 50¢ and some low cost producer should sell at 45¢, it would mean that some of the purchasers would have to pay a higher price than others, and that, especially if these purchasers were using this material in further production, they would be in a preferential position with reference to the others. The immediate results of the infra-marginal producer selling at a lower price creates an inequality among the consumers, which is opposed to the [fol. 1867] future beneficial results of competition.

Such action also has ulterior or ultimate results. The only way in a given market in which the infra-marginal producer could sell a larger quantity at a lower price (the whole supply being fixed at that point in the market) would be by taking some of the supply away from somebody else. If he took some of that supply at that particular moment away from the marginal producer the latter would throw it upon a future market and that added supply thrown upon the future market would tend at that time to depress the price all around. This depression of the price all around would naturally not be an advantageous thing for the purchaser. There would immediately follow an attempt on the part of the infra-marginal producers to capture more and more of the outstanding market and, by selling at a lower price, finally to carry on to a point where they would have a monopoly or, if not a monopoly, at least where they would be producing this greatly added supply at increasing cost, because it is a familiar fact that there is a point in production when every additional volume costs more under the law of increasing costs. The result of that would be that

prices to the consumer then in the end might be higher and would even be monopoly prices.

[fol. 1868] It would ultimately lead to higher costs to the consumer, and it would keep out of the market those producers, actual and putative, who might in the future become the most efficient and excellent producers.

We would no longer have competition in the economic sense of the term where it is beneficial.

A competitive price in the market at a given time and place means an equilibrium price, where the whole of the given supply is taken up by the whole of the given demand. In every market in any given time the supply and demand are fixed. That is what an equilibrium between a fixed demand and fixed supply means.

The low-cost producer, in determining whether or not he will reach for an additional part of the market by cutting his price, must decide whether he will make more by selling an increased quantity at a reduced price or selling a smaller quantity, which may be less than he can produce in his plant, at a higher price.

My principle, which in the ultimate result produces beneficial public effects, is grounded on the proposition that the infra-marginal producer will in the ordinary course of business refrain at some point from employing all of its ultimate capacity for the purpose of grabbing more of the market and putting the marginal producer out of business.

[fol. 1869] Where competition does not proceed through open prices, then you would no longer have the operation of the law of competition from the point of view of the beneficial results that attend competition. The absence of these open conditions would destroy and disrupt the conditions of equilibrium which are implicit in the theory of free competition. They would disrupt the equilibrium so far as the purchaser is concerned, because the purchaser would not know now whether to offer 50¢ or 60¢ or 70¢, and to that extent it would disrupt the conditions of demand.

Further, not being open, it would also distort the conditions of supply, because the infra-marginal producer would not know whether he was the infra-marginal or marginal producer; he would not know whether to stock up or stock down; he would not know a great many other facts which are necessary to be known in order to carry out the conditions of the theory of competition.

Secret price-cutting or cut-throat competition may bring about at any given moment a price which is somewhat lower to a larger number of buyers than the price which would exist in the absence of such secret price-cutting. Cut-throat competition will result in lower prices than the ordinary [fol. 1870] economic competition. However, it will result in those lower prices only for the time being because, as soon as the unfortunate competitor is now excluded from the market because of these cut-throat prices, it will be seen that this was simply a point in the process of attaining a monopoly. The cut-throat competitor who is now left, being in control of the market, his competitor being excluded, will at once proceed to raise the prices and enjoy all the fruits of monopoly.

We have an excellent illustration of that fact in the history of railway transportation, in the building up of the meat packers, in the great quasi-monopolies in Chicago and, above all, in the recognition of this situation by the Interstate Commerce Law which absolutely forbids all such secret rates, cut-throat rates and so forth.

The more any competitor knows of the conditions of competition among his competitors the better position he will be in to know exactly what to charge in the best interests of the community and of himself.

Every competitor is concerned with knowing how much he is to produce, how much extra capital or labor he is to employ, how much he is to throw on the market and how much he is to stock up for the future. Every one of these [fol. 1871] facts depends upon what his competitor does. If he has a better knowledge of what his competitor does, he will more fully fulfill the conditions of free competition, as the economist understands it.

The nearer we get to the conditions of open competition, the nearer we get to the theory of economic competition with general public beneficial results, as is understood by economists. It follows that the further away we get from secret rebates, preferential concessions and the like, the nearer we get to this policy and system of open competition.

A system where buying and selling goes on through a series of private trades or dickers, with the resulting price not being known to anyone except the parties to the individual bargains, would furnish the very antithesis of the theory and the practice of economic competition; and that it would

bring about the very conditions which are supposed to be non-existent in the theory of economic competition.

A discount for quantity which represents, because of the quantity produced, a lower cost to the producer is in part defensible, just as a discount for cash rather than for credit also means a lower cost to the producer.

[fol. 1872] Discounts for quantity, which do not represent a lower cost to the producer, are indefensible under a regime of economic competition such as I have described, although they are frequently practiced. A discount for quantity, which does not represent differences in cost to the producer, is uneconomical from several points of view. It is uneconomical as opposed to the theory of beneficient and economical competition, both in its immediate and in its ultimate results. A discount for quantity in the first place, not based upon differences in cost, represents simply another form of a discriminatory concession which creates favored classes of consumers. If a discount for quantity not warranted by a difference in cost is given to A and not given to B, then, of course, it gives a privilege to A which B does not possess and interfers with that equality of treatment which lies at the very basis of the theory of free competition.

If the reduction in the unit cost were due to the production of a larger quantity, it is immaterial whether that larger quantity is demanded by one man or by a number of men banded together.

Concerted action in opposition to true competition is, to be sharply and clearly distinguished from concerted or cooperated action, which is designed to maintain true compe-
[fol. 1873] tition by getting rid of the pseudo competition or the false competition to which I have alluded. Concerted or cooperative action on the part of individuals designed to promote true competition is defensible.

A business man tries to make money and every man tries to secure as much of a monopoly as he can under the law and make money that way. If he cannot, or does not want to, do that and finds it either impossible or impracticable, he can make more money and gain more profit by doing away with these forms of cut-throat and uneconomic competition, which will tend to raise the whole level of competition.

The market price is always at the point of maximum cost. The long-run, normal price, toward which every one

is tending and which alone makes possible the beneficial results, is the lowest cost. In the market place the marginal producer is the producer at maximum cost.

The highest cost producer is gradually eliminated from the market to the advantage of everybody concerned. The highest cost producer in the long run is the least intelligent, least capable or least fortunate producer who ought to be eliminated in the interests of the community. The low cost [fol. 1874] producer is the man of brains with capital and opportunities of all kinds who can give the consumer more of what he wants at the lower price.

At any given time the price is uniform in the market when you have an equilibrium between demand and supply. Over a period of time prices are not uniform but gradually tend in a certain direction, which is the direction of the low cost producer.

The reason why at any given time in a market the marginal producer is the producer at highest cost is because at that time, when a given supply is in the market, a part of that given supply is furnished by a producer who is at the point of marginal or highest cost. If it cost him 50¢ a unit to produce that and if the equilibrium price as fixed in the market is 50¢, he will just get what it cost him. He will not sell for 49¢ because he will withdraw his supply rather than take a loss. He cannot get more than 50¢ because the competition among the buyers beating down the price among the sellers will, under the conditions noted, bring about a price of 50¢.

If the other producers reduce their costs they become the infra-marginal producers and are able to offer the commodity at a lower price because they count upon selling more than enough of the commodity to recoup them for [fol. 1875] the lower price. They will then, the next day or week or month, come into the market and offer the commodity at this lower price which the former highest price producer will no longer be able to meet.

Therefore, on the marginal producer falling out of the market or selling less in the market this other man will sell so much more that his large sales, multiplied even by this lower price, will net him greater proceeds than the opposite. The only reason why he will stop going on doing that is that with every increase of production, after a point has been reached, his costs will increase. He will

therefore refrain from reducing the price to the point where he will make no profits.

In the meantime the new and lower cost or price at which the infra-marginal producers sell will represent approximately the cost of the new marginal producer, because as soon as he sells those in the market there is again a new market price and that new market price will now be lower than before but will still be at the point of the then highest cost producer.

Cross-examination.

By Mr. Fly:

I have made no special study of marketing conditions in the refined sugar industry, except in so far as an ordinary [fol. 1876] economist would be acquainted in a general way with all food production.

I have discussed the questions of the anti-trust laws, restraints of trade or competitive practices very frequently, first in my "General Principles of Economics", which is now in its 12th edition and which had a special series of chapters on that problem.

It is my understanding as stated at page 38 of my book that price associations "attempt to cement relationships among producers who are in the same field of endeavor and who seek by interchange of information and other means to facilitate the adoption of a price level which would be most desirable to the group as a whole."

If an industry is not utilizing its full capacity, the producer will always be glad to utilize some more of his capacity even though he charges less on this additional amount than he charged on the preceding amount.

If a producer has 100,000 units of supplies and makes a certain charge on that, which is more or less in accordance with his cost, let us say 100, and if he then preferred to take out of his stock on hand or increase his output because of unused output of 50,000 units, this additional amount will, under the conditions, cost him less. He has those 50,000 units anyway either in stock or readily available. Therefore he might be, under certain circumstances, quite willing to sell those 50,000 at a lower price. He might be willing to sell them, let us say, at 75 and if he sold 150,000 at 75 or even if he sold 100,000 at 1.00 and the remaining 50,000 at 75, it might pay him to do it.

[fol. 1877] Your question is whether, in the theory of free competition, this additional 50,000 units which he sells at 75 is to be allocated to those 50,000 units. My answer there would be that the reason why he is able to sell those 50,000 units at the lower price is because of the pre-existing 100,000 units. He is now selling 150,000 altogether. His machinery is speeded up for the purpose of 100,000 and he could speed it up easily a little more at relatively less cost so as to sell 150,000.

The reason why the amount is not to be allocated simply to the 50,000 is this: if it were not for the preceding 100,000 units which he sells at 1.00, these 50,000 units by themselves would perhaps cost him 2.00 instead of 75. It costs him 75 only because the total output now is 150,000.

I do not take the position that all price discriminations are improper. On the contrary, I think that a great many price discriminations are not only proper, but inevitable. If I buy my goods at a fire sale or a bankrupt sale, I might get them at considerably less than if I buy them new in the ordinary market and there is no one who would object to letting people buy at fire sales or bankrupt sales.

Defendants Exhibits J-17 and K-17 were received in evidence.

The only requirement of the theory of free competition is that the conditions under which the commodity comes into the market and the conditions under which the sale is made should be free and open. There is no necessity for an agreement on credit terms but there will be a great desirability as regards credit terms. The greater uni-
[fol. 1878] formity you have as regards credit terms the easier will be the whole conduct of the business and the less will be the expense involved and the benefit to the consumer will be greater.

It is requisite or desirable that the freight charges to each one should be known to each but not fixed by anyone.

True competition does not render either necessary or desirable suggestions from a trade association to the sellers as to what prices or freight rates the sellers should charge. That is very undesirable.

True competition does not require that all customers in a given market shall be charged the same prices and terms

regardless of differences in other substantial factors, such as the quantity purchased, the method of taking delivery, credit standing and others. Under certain circumstances true competition requires that no buyer shall be able to bargain for a better price or better terms than his own competitors receive.

I should say there are limits to the economic permissibility of a situation whereby the purchasers should be free to compete with each other in an endeavor to purchase a commodity at a lower cost.

A buyer should be free to try to bargain and attempt to get a better price than his own competitors but whether the producer would be justified in acceding to his wishes is entirely a different thing. In a truly competitive situation the producer is limited to the desirability of not doing anything [fol. 1879] which is opposed to the public interest.

Where a purchaser finds that it is no use to negotiate, and no good to talk to these sellers at all about the conditions in the trade, and finds himself merely in the position of an order clerk, where he has no discretion at all as to the price he shall pay, because it does him no good to negotiate, that is opposed to the theory of free competition.

If the buyers, due to the inutility of negotiation get in the habit of ordering their commodity without any attention being given to the prices of the different competing sellers, and without any effort being made to get a better price from one seller than from another, because of the fact that he has become convinced that it does him no good and hence the buyers quit the practice of so negotiating, that is not a truly competitive market (if there is no utility in their making a change.)

It is consistent with my idea of true competition that a refiner may offer to his trade, without withdrawing his regular prices and terms, an alternative contract with different prices and terms.

If due to inflexible uniformity of price, buyers are utterly unable to negotiate, that would not be in harmony with the theory of free competition, but I see no application in that at all to the sugar industry because that is not an essential element or does not contain all the essential elements of the case. I think your hypothesis that states that there is no

opportunity on the part of the purchaser to bring any influence to bear on the price is incorrect.

When we have, as in the sugar trade, a publicly announced price, one producer announces a price at which he would be willing to sell. The others come along and say either "no" or "yes." If they say "no" then that publicly announced price is withdrawn and another publicly announced price is announced. If, on the other hand, they all say "yes" there is a publicly announced price.

The purchaser there is practically in the same position that I should be in if I went to Macy's, a large department store in New York City. If I go there and ask for a commodity having a publicly announced price of 10¢, I know it would be futile for me to argue with Macy and say "will [fol. 1880] you give it to me for 9¢ or ask him to make a secret dicker with me. If I find 10¢ is too high I simply will not take it. If I do not take it Macy or the sugar refiner, the next day, will make a publicly announced price of 9¢. Then I will buy.

In other words your hypothesis in your first question does not apply either to Macy's ~~or the~~ sugar industry because there is a mass opinion among all the would-be purchasers continually brought to bear.

Lower prices will only slightly increase the consumption of sugar because the demand is very inelastic in so far as the normal price is concerned, but of course at any given time in the market the amount taken will depend entirely on the price at which it is offered. If the price is low, they will take a lot of it. I think that if an individual purchaser of sugar negotiates for a stock of sugar he has just about the same prospect of getting the price of sugar lowered as a shopper who goes to Macy's and attempts to get a lower price on an article there. At Macy's there are all of the conditions of free, open and true competition and there are the same conditions of a free and open competition in the sugar industry.

[fol. 1881] The mere fact of price not being announced has nothing to do with the case. The mere fact that the individual would be unable to make dickers and trades and all that sort of thing has nothing to do with the case.

The statistics essential to the true competitive situation are the total output of the industry as a whole, the stocks

which are left over from the last month and the demand for stocks from various sources, perhaps Europe, perhaps different parts of this country, in other words, the amount of deliveries to a particular section of the country. A great many more facts of that kind are found in the Monthly Bulletin of Commerce. The facts as to the quantities of raw materials on hand are important to the trade. The costs of the different manufacturers are absolutely inconsequential to the question at issue. The supply which each manufacturer has on hand is one of the important factors.

The ideal true competitive market is found in the case of uniform standard articles. When a commodity is sold on a delivered price, that is, a list price plus a certain charge on account of transportation to a point of delivery, you are selling one commodity but the price is made up of 2 component parts. Assuming that several manufacturers come [fol. 1882] into that market at varying freight rates, you have the uniform price to the consumer in that market but a varigated cost to the different producers. You are still selling an entirely standardized commodity.

Assuming that in a particular market one manufacturer, due to advertising, has acquired a commanding reputation that the ordinary purchaser prefers the well recognized brand and in some cases prefers it to the extent that he will pay more for it, you are still dealing with a standardized product in that market. Assuming that the quality of the sugar is the same but due to the standing and reputation of one particular brand it has a decided preference in that market over the products of the other manufacturers to the extent that not only will it be preferred at the same price but that the ordinary purchaser is willing to pay more money to get it, I would say that from the point of view of competition it is a standardized product as long as it is the same product.

If you have a well recognized reputable brand, a preferred brand, and the brands of competitors, which are not preferred in that market, there are two entirely different products,—one a preferred brand because it is different for some reason, and the other which is not preferred and from [fol. 1883] a marketing or competitive point of view they are two commodities.

A truly competitive situation contemplates that the purchasing trade as well as the sellers shall have full information as to capacities and production, deliveries and stocks of the finished product on hand and the like because the more such information they would have the closer you would approach to the conditions of a free competitive market. Unless the purchasing trade as well as the selling trade have all of that information you have not perfect competition. You may have a good deal of approximation to it but not perfect competition.

I have made general studies, not particular studies, of industries using a price reporting system through a trade association. I know of such an association which is called the Protective Associated Trade Association. It is an English association which I have particularly studied and which gives information as to future prices and terms as distinguished from closed and past transactions. I have made a similar study of a Canadian association. I have made no such study in this country. The English associa-
[fol. 1884] tion is one of manufacturing druggists, the wholesalers and producers who sell to retailers. They have a very extended system of such reports to each other, which in the last report of the English Commission are very highly praised as leading to open and better conditions in the market.

Assuming that there are the same sellers in two neighboring markets where all the conditions are the same and the only difference is that there is a distance between the two markets, the difference in price in the two markets under a truly competitive situation would be ascribable only to transportation costs.

That is the same point which Professor Clark was referring to in extracts from authorities which I submitted yesterday. It is my understanding that is what he had in mind when he said "A nationwide market is really a system of markets so connected by railroads and telegraph wires that prices of standardized goods cannot differ for long by more than the cost of transportation, plus enough margin to pay for the trouble of simple shipment and sale."

Petitioner's Exhibits 512 to 526, inclusive were received in evidence.

[fol. 1885] Petitioner marked the following parts of Exhibit 14, Willett & Gray's Journal, as parts of the Exhibit on which they intended to rely:

January 7, 1926, page 19.
January 28, page 48.
February 25, 1926, page 100.
April 15, 1926, page 201.
April 29, 1926, page 216.
May 20, 1926, page 265.
May 27, 1926, page 268.
June 3, 1926, page 282.
June 24, 1926, page 318.
July 1, 1926, page 332.
July 29, 1926, page 382.
September 16, 1926, page 268.
October 21, 1926, page 528.
November 19, 1926, page 578.
December 9, 1926, page 618.
December 23, 1926, page 644.
December 30, 1926, page 658.

Petitioner marked the following parts of Exhibit 15, Willett & Gray's Journal, as parts of the Exhibit on which they intended to rely:

January 13, 1927, page 35.
February 24, 1927, page 102.
March 17, 1927, page 142.
April 14, 1927, page 192.
April 21, 1927, page 204.
April 28, 1927, page 216.
May 12, 1927, page 244.
May 26, 1927, page 268.
June 23, 1927, page 316.
July 14, 1927, page 352.
July 29, 1927, page 376.
August 25, 1927, page 424.
September 1, 1927, page 436.
September 22, 1927, page 476.
November 17, 1927, page 574.
December 22, 1927, page 638.

Petitioner's Exhibits 527 and 528 were received in evidence.

Defendants' Exhibit L-17 was received in evidence.

Redirect examination.

By Mr. Higgins:

Assuming that all producers sell only at open and publicly announced prices and as a result of such policy their prices at a given time are all the same. I, as an economist, [fol. 1886] can conceive of a very effective and clear way that the buyer can do something to bring about a lower price.

If any would-be purchaser finds that the price is unsatisfactory, he can refrain from buying and by that very act show that he is not satisfied with the price but would like a lower price. If other would-be purchasers have similar

opinions, the result will be that the mass of the would-be purchasers will either refrain entirely from buying at that time or buy much less than they otherwise would if the price were more satisfactory. The influence brought to bear by the mass of the would-be purchasers would be, in my opinion, quite effective in bringing about the result desired.

In the case of a manufacturing industry, selling at wholesale where the buyers are largely professional buyers in close and constant contact with the sellers and continually having the advice of a body of skilled brokers who keep themselves professionally advised as to market conditions and pass along their counsel and advice to their buyers, I should think that the type of influence that the buyers do and can exert on the sellers would be a strong and effective influence on the market price.

[fol. 1887] The absence of individual dealings and dickers, whether open or secret, between particular buyers and particular sellers does not indicate that the buyers are not exerting influence on the price in accordance with the requirements of economic conditions. On the contrary I should say that the force of this massed feeling on the question of whether the price ought to be made lower would be a very much stronger influence than the opinion of any one or series of individuals under a system of private dickers.

If any one man could obtain a secret concession for himself, he is very much less interested in what will happen to all the others and therefore the influence that would be brought to bear would be less.

I have been given the example of a purchaser who went into Gimbels found that their price was higher than Macy's and upon telling Gimbels that fact, Gimbels met that price. That sort of situation, where the buyer informed one competitor of the price another was charging and as a result got him to meet that price, represents a much less perfect instance of the free operation of economic competition than such a situation as exists in the sugar industry where all the sellers have the same openly announced price.

[fol. 1888] The reason that Gimbels agreed to reduce the price is because he did not know beforehand that Macy was charging a lower price. Had he known that Macy was

charging a lower price he never would have asked the customer the higher price. He would have met the lower price of Macy before the customer came into the store. If Gimbel knew from advertisements or information supplied by one of his own clerks that Macy is charging less, he would at once of course reduce his own price so as not to keep away people who thought they might be paying a higher price in his store. When Macy advertises they are selling a thing for 60¢, it would be suicidal for Gimbels to advertise they would sell it for 70¢.

If, they had decided they would meet Macy's price only for the informed shopper who knew of the Macy lower price, but in other cases would charge their other customers more, I should call that a very imperfect as well as a very ignorant form of competition.

When I testified to the Stock Exchange as an excellent example of true competition I was aware that a separate price is made on each separate transaction. I also stated that in merchandising a commodity like sugar or any similar standard commodity which is sold on a wide market area, if the sale is made as a result of separate negotiations between buyer and seller such a state of affairs would not be a case of true competition. In the merchandising of a [fol. 1889] standard commodity the conditions are absolutely distinctive.

The Stock Exchange is a place 200 feet in circumference in which all the buyers and all the sellers meet in absolutely open competition and where everyone within that radius of a few hundred feet knows what everybody else is doing, both from the point of view of a purchase and sale. When you are dealing with conditions you have just mentioned in merchandising, where the market may be a market covering 3000 miles, it is absolutely impossible for every purchaser or seller to know or to hear what the other one is doing, and the only way that sales could go on through private dickers or arrangements, in themselves perhaps legitimate enough, would be privately. Each one would do that and make his own arrangement. That makes the essential difference between an exchange and a wide national market. What makes the Stock Exchange an excellent example of free competition is the absolute publicity under which sales are made, but not the fact that each sale is the result of a separate bargain.

The reason why a series of separate bargains in the sale of a commodity in the ordinary channels of merchandising is incompatible with free economic competition of [fol. 1890] the desirable type which I have testified about is because by the very nature of the case such a series of such transactions and bargains cannot and do not enjoy full publicity.

By Mr. Fly:

The more private dickers and bargains you have the greater chance there is of illigitimate, uneconomic and discriminatory private arrangements which would militate against the conditions of true competition. Where you have a series of private dickers and sales without publicity you have a less complete form of free and economic competition.

By Mr. Higgins:

In order to bring about in merchandising the same condition of free competition which prevails in the Stock Exchange it is necessary to provide some means whereby, at the time the sales are being made, buyers and sellers will know the prices at which those sales are offered. If it be assumed that it is the practice in the refined sugar industry since the Institute was organized for each seller to sell only at the price which he has previously publicly announced to the trade, buyers and sellers alike, until such time as he decides to publicly announce another and dif- [fol. 1891] ferent price, and does so publicly announce another and different price at which he proposes to sell, I would say that such a practice tends to produce, so far as is possible in a merchandising business of this character, those conditions of publicity on which free and economic competition depends and which are realized in another way on the Stock Exchange.

The particular devices or practices which are best calculated to bring about publicity on which those economic conditions depend not only might vary but inevitably must vary in different kinds of business as, for example, the Stock Exchange on the one hand and the retail trade on the other hand the wholesale trade as a third illustration.

Take for example Sears, Roebuck & Company who sell retail from price lists or price announcements, or the de-

partment stores. They could either use price announcements, price lists or they would advertise in the newspapers prices at which they are ready to sell. The number of possible differences of methods to accomplish the same result is very great.

Competition tends to cause market price to approach the normal price through a constant tendency for the high cost [fol. 1892] producer at a given market price to be eliminated in the industry through a decrease in price with the result that his place is taken by another high cost producer with somewhat lower costs. That process is promoted when competition goes on in the open as compared and contrasted with secret competition. Under a practice of secret competition and special deals in the dark, this process of elimination is not as economic as where price competition is in the open because in the first place if there is no publicity but only secrecy it may be that the one who is shut out is not necessarily the highest cost producer. If it goes on in the open there is not much chance of hitting below the belt; if it goes on in the dark you cannot only hit below the belt but you may even have a bowie knife and strike your opponent in the back. You can do all sorts of things if no one knows about it.

The result of such secret rivalry or competition is perhaps, and sometimes quite necessarily, to make the victor the man who is not necessarily abler and better. Thus, in the same way in industry, where you have secret and not open conditions, the man who may be pushed overboard is not necessarily the man who is least fitted naturally to survive, but the contrary.

[fol. 1893] I have always used the term "cut-throat competition" in the literal sense of the term, namely, the competition through which one competitor seeks to cut the throat of and to eliminate the other competitor by reducing prices to such a low point that, irrespective of his costs or anybody else's costs, the other competitor is eliminated. Cut-throat competition, colloquially, is sometimes meant to imply all those forms of uneconomic competition which tend to make it more difficult for one competitor to survive, and which makes it easier for the man who is practicing the so-called cut-throat competition to survive. Cut-throat competition goes on in the open. There are many other forms of both open and secret interference with true compe-

tition which are just as bad in my opinion as cut-throat competition.

Recross-examination.

By Mr. Fly:

It may not be unfair competition for a man to enter honestly into a business transaction without publicizing it, but it is not economic competition.

[fol. 1894] RUDOLPH SPRECKELS was called as a witness on behalf of the Petitioner.

Direct examination.

By Mr. Fly:

I am president of Spreckels Sugar Corporation. Subsequent to 1889 I acquired with my brother an interest in plantations in the Hawaiian Islands which I sold in 1898. I came to New York in 1927 on business and with no intention of ever getting into the sugar business again. My brother was in very bad health and I was elected president of Federal Sugar Refining Company.

I discovered the company was hopelessly involved in debt to the banks to the extent of nearly $7,000,000. I assumed these obligations and subsequently got into the refining business. Spreckels Sugar Corporation was organized in January 1929 to take over the Federal Sugar Refining Company and because I had paid $7,000,000 in bank obligations and put in an additional sum of over $4,000,000 I received over $11,000,000 of preferred stock in the new company. Spreckels Sugar Corporation went into receivership within the past two weeks.

The Petitioner and the Defendants, Harper, Stone, Spreckels and the Receiver for Spreckels entered into the following stipulation:

STIPULATION RE TESTIMONY

Alfred H. McCausland will, if called, testify as follows: [fol. 1895] I am employed in the Receivership Department

of The Irving Trust Company and in charge, in this department, of the receivership of the Spreckels Sugar Corporation. The Irving Trust Company was duly appointed Receiver of said Corporation by order of the District Court for the Southern District of New York, said order being dated January 18, 1930. On February 26, 1932, said Receiver filed in this Court a report, a copy of which is hereto annexed as Exhibit A. On the 20th day of June, 1932, the Receivers filed with this Court another report, a copy of which is attached hereto as Exhibit B. The Receivers have no intention of reopening the refinery or operating the same. To the best of the Receiver's knowledge and belief, the Spreckels Sugar Corporation will be unable to reopen the refinery or operate it. No plan of reorganization has been submitted by the creditors of the Corporation, and the Receivers believe that if any reorganization takes place the present stockholders would have no interest in the new corporation. However, in spite of repeated requests by the Receivers, the creditors as above stated, have not submitted any plan. The Receivers at the present time are engaged in taking an inventory of the machinery looking toward its sale, and they have advised the creditors that unless a plan of reorganization is shortly forthcoming the Receivers must [fol. 1896] of necessity. liquidate the remaining assets of the corporation. Since the report, Exhibit B, was filed, the only change in the corporate situation has been that the cash on hand has declined to $55,000., and taxes have accrued, unpaid, at the rate of approximately $9,000 per month. All the inventory, with the exception of machinery and replacement parts of said machinery and the char, were sold at the time the report of June 30, 1932, was filed. In addition to the bonded indebtedness of the Corporation claims in the amount of $1,613,602.08 and additional claims of £122,170.10 Sh. 8d, have been allowed by the Receivers and other claims have been filed and disallowed, and action thereon is pending. In the opinion of the Receivers there is no present indication that the Spreckles Sugar Corporation will ever resume business.

[fol. 1897] FRED G. TAYLOR recalled.

Direct examination.

By Mr. McGratty:

I recall the discussion to which Moog refers in Exhibit 394 and the December 7 meeting at which the discussion took place. He said there appeared to be an increasing disposition on the part of refiners who suspected that some other refiner was engaged in an unethical practice, to employ some drastic, destructive, retaliatory action without letting the Institute function as it was supposed to function. He felt that the complaint should be brought to a formal meeting and discussed with other members. The idea met with little sympathy and Sprague of Savannah accused Moog of having recently violated the principle that he was now urgently advocating when he broke down the freight structure in certain southern points below any of the existing freight rates there because of his belief that Savannah was engaged in some unethical practice with respect to its warehousing operations.

Moog admitted he had gone off half-cocked in that situation, had made what he considered to be an unwarranted announcement and that after Savannah had called his bluff he had withdrawn it. He further stated that if we had had such an understanding as he was now proposing he would [fol. 1898] have been spared that embarrassment. However, it was merely a suggestion and nothing more was done about it.

At the meeting of March 13 Moog reiterated what he had said at the other meeting. The other members stated they did not propose to have their hands tied in waiting for either a regular or special directors' meeting. If they became convinced that some other member was indulging in some unethical practice or conduct they wanted to be in a position to meet it under open announcement in their own way without delay. The matter was dropped and no attempt was made to clear sentiment with respect to it.

Exhibit 468 consists of notes which I made while acting as secretary of a Chicago consignment point meeting and notes which I made on the train en route and back to New York.

The notes referring to "a major operation" on the pages headed "Notes re: Chicago Meeting" were written on the train coming home. In preparation for writing my minutes I was clearing my own impression with respect to what we had discussed and decided at that meeting.

[fol. 1899] I knew the attitude of C. & H. with respect to the Texas situation generally. Rolph told me that he was exasperated at the continued difficulties in Texas and said "I have reached the conclusion that there is only one way to settle that matter and that is for us to gain relief from the provisions of the Code of Ethics, or that we suspend the Code of Ethics and resort to whatever may be necessary to meet competition in that locality."

There was no discussion at the Chicago meeting with regard to the continuance or elimination of the Texas pick-up. Referring to item 6 on the second page of the Exhibit, I came away from the meeting with the distinct impression that the freight pick-up at Texas under the change in rate structure that occurred the year before, was responsible for the continued transit abuses which were reported from that section. I am not a traffic man and somehow I got the impression that the 17¢ pick-up over the Sugarland rate was the temptation causing the irregularities about which there was so much complaint.

Exhibit 459-O sets out all the things we either agreed or determined to do at the Chicago meeting.

[fol. 1900] My first contact with the Department of Justice representatives was with Whitney, and the time and occasion are already testified to by Cummings. Upon the occasion of his visit we were instructed to and made effort to give him access to everything in the office and help to facilitate his examination. That examination was made in the early summer of 1928 and he was there probably 2 or 3 days. He came back twice afterwards, dropping in for short conferences.

The next contact was with Fly who came in around December 1929. I told him that we had welcomed his predecessor to our office and had tried to facilitate his examination because if there was anything the matter with the Institute, the Department of Justice surely could not be more interested in discovering it than we; that we had established ourselves with a view to permanency and believed we were proceeding cautiously according to our legal privi-

lege and that if anyone had any different ideas we were very anxious to discover them. I then introduced Fly to the members of the staff and told them to give him access to everything in the office without reservation. After he was there 2 or 3 days he came to my office to say he had completed his examination. I had a brief discussion with [fol. 1901] him and in the course of it offered him a working file that he had not seen. Exhibit 468 was included in the file which Fly took away with him. In December 1929 Gorsuch came. He was given access to all of the files. The next I heard from the Department was when I was in San Francisco preparing for the meeting of March 31, and I received the shocking news that a petition of dissolution was filed against us.

[fol. 1902] Louis V. Place recalled.

Defendants' Exhibits M-17 and N-17 were marked for identification.

Direct examination.

By Mr. Higgins:

Exhibit M-17 for identification is an accurate statement of the specific concessions and rebates granted by McCahan in 1927. Exhibit N-17 is the key list giving the customers' names and addresses in each case corresponding with the number set out in Exhibit M-17. Exhibit O-17 is an accurate compilation of the concessions set out in Exhibit M-17.

Defendants' Exhibit O-17 was received in evidence.

Concessions were not given on all deliveries because there were periods in 1927 when we did not give any concessions or where there were customers to whom we gave only on some deliveries. During 1927, by a gradual process various customers were added to those receiving concessions. Most of these were probably added in the second half of the year. In Exhibit M-17 opposite "Customer 18" [fol. 1903] there appears in parenthesis "On some purchases only", being a straight price allowance of 10¢, and in the column "Storage allowance" 5¢. What is meant is

that a storage allowance was given to this customer on all purchases on which concessions were given and on some of those purchases there was a further straight price allowed of 10¢, making the maximum concession 15¢ and the minimum concession 5¢.

The average concession is something between 5¢ and 15¢, as indicated by the minus sign after 15¢. There have been others on which there was no concession given at all. All of the concessions which were given in 1927 were reflected in the price of sugar entered on our books, with the exception of one. Whether the concession was in the guise of storage or whether it was a straight price allowance or whether it was any sort of concession, it was deducted from the sale price of sugar.

There was an exception made in the case of one customer, No. 147, to whom we paid brokerage. We also paid brokerage to the regular broker but during the first half of the year both brokerages were entered in our brokerage account. The amount we paid the customer was really a straight discount in the form of brokerage.

[fol. 1904] The practice of special concessions to certain of our customers was a gradual process which began in 1924. At that time and until the middle of 1927 we attempted to reflect whatever concession it was necessary to give to retain a customer's business in the price entered in the contract. After the middle of 1927, in quite a number of cases, it was not reflected in the price of the contract but was taken care of by some rebate subsequent to invoicing and payment. The arrangement was not known to our other customers. We confirmed it as a confidential price and expected the customer to keep it confidential. I believe that in practically every case they did so because it was to their advantage.

We changed the practice in the middle of 1927 because we wanted a special price below our selling basis to be kept confidential. We suspected in some very few cases they had not been kept confidential and that was the reason we adopted the system of giving rebates rather than reflecting them in the price of the contract. Where we had showed the concession in the contract it was a concession below the selling basis.

We granted them because they were necessary in order to retain the business of that particular customer. We ar-
[fol. 1905] rived at the conclusion that they were neces-

sary because of the plea or representation of the customer or his broker that such a concession was available from another source of supply. We did not attempt to meet the concessions which our competitor was alleged to be giving in the same way in which he was giving them.

Prior to the middle of 1927 we attempted to reflect it in the price of the contract. After that in some cases we would match the concession we were told the buyer would get from another source of supply, either in the form of storage allowance or a deduction from the invoice or a credit memorandum at the end of the month or a check at the end of the month.

In the weighted margin figures which McCahan prepared for this case all of the concessions or allowances stated in Exhibit M-17 and summarized in Exhibit O-17 were taken into account. They have all been deducted from the price of refined sugar shown in the margin figures.

It includes the 2½¢ to one of the customers in the guise of brokerage. In addition to the concessions of various types, kinds and amounts, we granted to certain customers other special concessions and favors which do not appear [fol. 1906] on this list, such as allotments running beyond the date of the effective price to the general buyers, guarantees in territory where the guarantee was not announced and possibly extension of payment terms. The allowances of this type were all reflected in our books of account by the total ultimate price shown.

I came into contact with quite a number of buyers personally. We came into contact with them directly through the brokers. The brokers might be called the professional buyers, the buying agents for the customers, and they were attempting at all times to get the best terms they could.

Before the Institute there were 2 types of pressure that they brought to bear on the refiners. One was the pressure for a general reduction in price and that was going on at all times. In addition, there was the endeavor on the part of the buyer and the broker to obtain a special inside price for a particular customer. The customer who received inside price was at an advantage as compared with the other customers and he was not so much interested in the general price level but the pressure for a general price decline was on all the time.

The sugar brokers are the best informed class of buyers of whom I have any knowledge. They follow closely all the [fol. 1907] details, all the gossip, every particular source of supply and information which they can get hold of. Their information in this particular and the pressure which I have described was manifested by a continuous hammering away at the refiners with statistics or information of any kind that they had available which tended to show that the price was too high. In some cases they were right and the market eventually proved they were right. In other cases they were wrong and the refiners were driven by the raw market or by some other circumstance to advance the price instead of decline it. I do not mean to say by any means that they were right in every case, but that the pressure of argument was always present.

In addition to that, probably the most effective means they have is to advise their customers not to purchase or to purchase a minimum and their power in this direction is enormous. Whereas it is true that the consumption of sugar is inelastic, the distribution is highly elastic and most of the so-called consumption figures which we have are not consumption figures. They are distribution figures and vary from year to year and month to month enormously. The invisible supply of this country can reach as high as 1,000,000 tons or can decline to zero.

[fol. 1908] That manifests itself both in the reluctance or refusal of the buyers to buy spot and in their reluctance or refusal to enter substantial contracts when the refiners attempt to move, so that at times the moves are very small if the buyer's psychology is against the refiner and at other times the moves are very large if the buyer's psychology is in accord with the refiner's price movement. The same price move with a different psychology will have an entirely different result.

There have been no changes in the way in which buyers' pressure has been brought to bear upon the refiners to reduce the general price level since the organization of the Institute. If anything, I would say that the pressure is greater at the present time than it was before the Institute. The large buyers who were getting the concessions were satisfied that they were getting something better than the general price level which put them at an advantage as compared with the general run of buyers.

Being in contact with the buyers and brokers every day, the feel of this psychology factor is on the fingertips of every manufacturer. Naturally it is reflected in the sales or withdrawals. The practical manifestation to the refiner in that situation is whether his buyers are buying readily [fol. 1909] and taking on new supplies of sugar and maintaining their invisible supplies or whether they are not buying or withdrawing readily under their present contracts and eating up the invisibles.

Defendants' Exhibit P-17 was received in evidence.

Defendants' Exhibit Q-17 was received in evidence.

The circular letter from the Institute dated June 19, 1929 on the subject "Enforcement Committee Meeting" is the original of such circular received by our company and according to my information and belief it was sent to all the refiners.

Defendants' Exhibit R-17 was received in evidence.

Cross-examination.

By Mr. Rice:

We did not give an advertising allowance or any other allowances of any sort that I have not mentioned. I cannot think of any specific cases in which we performed any other service for our customers that we have not been performing since 1928.

[fol. 1910] There has been no change in trucking except that it has developed gradually and we are doing more in the last few years than ever before. We did not eliminate some of the trucking service since the Institute but on the contrary have added greatly to it. I do not know of a single community in which we have decreased our trucking service.

On the Exhibit, which we prepared showing the actual margin between what we paid for raw and what we received for refined, we deducted all concessions that could be expressed in dollars and cents and all concessions that were on Exhibit O-17. There are no others that are not specifically deducted.

If the price had gone up and we were still charging some favorite customer the old price it was the old price that went on the books.

The Willett & Gray margin for the year 1927 is 1.098. The margin which I have shown on Exhibit X-12 is .9169 for the year 1927, a difference of about 17¢. If we had purchased raw sugar at the average price shown by Willett & Gray in 1927 we could have gotten it for $4.73. Exhibit X-12 shows that we paid $4.7955, a little more than 6½¢ more than the average daily quotation of raw shown in Willett & Gray. There is more than one factor to this margin. There are so many factors you simply cannot tie them up. The important point is not the comparison with the daily but the comparison with what our competitors have done. The comparison of the average daily quotations of raw sugar shown by Willett & Gray with our figures is of no importance in the quistion of our profits or our margin. The important thing is what we get as compared to what our competitors get.

When we show a concession of 10¢ on Exhibit O-17 that meant a concession of 10¢ from our selling basis.

Our selling basis was not the same all over the country on any particular day in 1927 but it was the same in each community. Concessions were from the selling basis in the particular community where we sold.

My company sells futures. In a declining market we make a gain on selling futures. The market has been declining on raws generally in the last 3 years. I believe that the gains which we have made on our sales of futures are not shown in Exhibit X-12.

Redirect examination.

By Mr. Higgins:

The different selling basis which we had in the years [fol. 1911] before the Institute was a territorial matter in every case. There might be, between the limits of 2 territories, 2 cities comparatively close together which would have a different selling basis. Usually the selling price was the same in a wide territory, such as the Northeastern States.

The amount and the prevalence of concessions in the industry generally, and in our business in particular, accelerated in the year 1927 as compared with previous years. In the last half of the year it accelerated at least twice as much as the first half.

It was a gradual breaking down process. The minute a discrimination of that kind creeps in, it tends to break down as it goes along and it increases geometrically rather than arithmetically. In 1927 in McCahan's case, and I believe it was true in the case of other refiners, the rate of production during the first half of the year was greater than the rate of distribution so that stocks had accumulated in the middle of the year. At the same time there was an increase in the beet crop which was being pressed for sale in the latter half. There was also an increase in pressure from the West Coast refiners, particularly C. & H. All of these things interfered with the normal distribution of refiners and made them more susceptible to attacks by the buyers.

[fol. 1912] THOMAS S. ADAMS was called as a witness on behalf of the defendants.

Direct examination.

By Mr. Higgins:

I am professor of political economy at Yale University. I have been connected with American universities as a professor of political economy since 1901, with the University of Wisconsin, Washington University at St. Louis, Cornell University and Yale University since 1916. I am a member of many learned technical associations and have been president of the American Economic Association, the National Tax Association and the National Bureau of Economic Research.

My economic experience outside of the academic field includes my services of expert for the Wisconsin Tax Commission from 1903 to 1907, service on the Tax Commission for the State of Wisconsin from 1911 to 1915, economic adviser to the Treasury Department from 1917 to 1922, chairman of the Board of Excess Profits Tax Reviewers of the United States Treasury Department from 1917 to 1918, chairman of the Advisory Tax Board, Treasury Department, 1918 and 1919 and since 1928 membership on the Fiscal Committee of the League of Nations.

I am author with Dr. Ely and Mr. M. O. Lorenz of the widely used general Treatise on Economy. It is widely used as a textbook and has been for many years.

[fol. 1913] I have given special study to the question of competition. In my duties as chairman of the board of Excess Profits Tax Reviewers of the Treasury Department I dealt most frequently with capital and profit figures and income and related figures, particularly dealing with capital and income profits.

I have examined Exhibit O-3 with some care and am aware that except at, and very closely about the time of the price change the announced prices of the refiners on the same day were substantially uniform. I think such uniformity not only may result but almost inevitably will result if the article is a standardized article and if the terms of sale are widely announced and familiar to the various buyers.

If the various buyers know the terms of the sellers, self-interest will lead them to take the lower offer. On the other hand the seller who by chance should sell to some group of customers lower than the others would find his general body of customers dissatisfied and disaffected in the long run, so I think those 2 sets of forces could bring about the substantial uniformity which you find in the graph. The identify of uniformity at a given time in a given market of the market price of a standardized commodity is well understood by economists. I know of no exception among economists of standing.

[fol. 1914] I have read the Code of Ethics of the Institute and am aware that it provides that all discriminations between customers should be abolished and that sugar should be sold only upon open prices and terms publicly announced and I am aware that it also condemns quantity discounts in the sugar refining industry as unsound and discriminatory. I am aware that the Code condemns as discriminatory certain competitive practices, such as variations from open and publicly announced terms by way of special discounts and allowances for brokerage and storage payment or brokerage for the benefit of the customer, special service to the customer without charges therefor and certain other trade practices.

Assuming that the refiners who are members of the Institute pursued the business practices recommended by the Code and refrained from employing the practices condemned by the Code, I would still say from the standpoint of an economist and a student of competition that if uni-

formity existed in prices at which the refiners were offering their produce, such uniformity could be the result of the operation of competition. When I say that, I do not mean to imply that competition between them is rendered imperfect because of their refraining from the practices and tactics condemned by the Code.

[fol. 1915] In so far as the provisions of the Code are designed to prevent or operate to prevent variations from openly and publicly announced terms and prevent giving to special favored customers all concessions of special terms and advantages, I consider that for all the competitors to comply with these provisions of the Code and to refrain from the condemned practices would promote the type of competition which is deemed by economists to be beneficial and in the public interest.

Uniformity of price could be brought about by an agreement among competitors. I do not believe there are any absolute tests to determine whether there is direct evidence of collusion of some kind but there are a number of indicia which students of this subject use as possible symptoms perhaps of the existence of an agreement.

They use a comparison of the price of the commodity under question with general commodities because of the cost of raw material. They also frequently look for what might be called fixation of the relative share of the various alleged conspirators or competitors in the general market; freezing of those conditions is perhaps indicative of agreement. They use the matter of price stability. The stability of price is an indication. They use the profits of the indus-

[fol. 1916] try which is I think a very important test.

I have examined Exhibit E-16. I see no indication whatsoever from the price trends here recorded of the presence of an agreement. In comparing prices of sugar, retail and refined, with the prices of all foods, for instance, there seems to be on the whole from 1928 and 1929 and through part of 1930 a more rapid downward trend of the price of the sugar retail and refined than the index number of all food prices. Thereafter the reverse is true. The index of all foods declined somewhat more rapidly than the prices of sugar. That would seem to be due on the whole to a stiffening up of the price of raws which began with the latter part of 1930, remaining on the general statistical level; rising level and falling level for 15 months or so. I certainly see nothing in

it indicative of an agreement or the results of an agreement.

Another test employed is the absence of changes in the relative output. From my examination of Exhibit Y-14 I see no evidence of freezing of conditions of relative shares of the various refiners measured by these figures for the melt. The percentages vary and as between the period 1925 and 1927, compared with 1928 as against 1931, there seems to be rather more variations in the latter period than in the [fol. 1917] former.

McCahan's percentage of the total melt for 1928 was 3.36, for 1929 3.70, for 1930 4.69 and for 1931 5.04, indicating a very large increase. Colonial moved from a figure of 1.60 for 1928 to 2.26 in 1931, although Colonial was higher in 1929 than in 1931. Spreckels' figures are 3.52 for 1928, 6.27 for 1929, 4.0 for 1930 and 0 for 1931.

I can see nothing at all indicative of fixation or freezing of shares of producers in these figures but rather some little evidence to the contrary.

The presence or absence of elimination of competitors in an industry over a period of years I think is a test that would be employed by an economist to determine the presence or absence of an agreement in restraint of competition.

Assuming that since the formation of the Institute Spreckels went out of business through financial difficulties in 1930 and that the Texas City refinery closed down for similar reasons at the beginning of 1932, I would regard that as a normal percentage of elimination and certainly would give an affirmative answer to the test inquiry "Has there been normal elimination?"

I would say that such elimination would give no support [fol. 1918] in an examination of this kind of evidence for a belief that there has been agreement in the industry. This question of elimination must utilize a period of time and the period of time is too short to give a satisfactory test. Elimination is going to show itself normally over a considerable period of time. If you have the elimination of 2 companies, one of them as I recall about the sixth largest in the business, for a time at least, in the course of 4 or 5 years, that seems to me to be a normal amount of elimination, certainly not less than a normal amount.

Elimination under competitive conditions usually comes in the period of depression. I would regard the fact that

Spreckels went out in the period of depression rather as confirming the other test. I was not informed that Spreckels was losing large sums of money during the prosperous years. I have known that Spreckels has gone out of business from my own knowledge. I do not attach too much importance to it one way or the other.

I have examined the table in Exhibit F-15. I find what I would call a perfectly normal and natural variation in the shares in the various markets obtained or had by the various companies. For instance, taking the American, I note [fol. 1919] that in Rhode Island its share fell from 42% in 1927 to 21% in 1931, whereas in Connecticut there was a slight increase. National in the North Atlantic field lost ground in practically every state except in Connecticut where it had a very noticeable increase. Speaking generally, there stand out over the figures in this table evidence of shifting shares in the business of various states and I see no movement toward fixity or evidence of fixity to attract my attention.

The phenomenon that interests me in this connection is the jockeying or maneuvering around in various forms that these price changes have taken. This jockeying and these maneuvers take so many different forms that they correspond precisely to the sort of situation that I should expect in an industry governed by competition.

If I were going to fix prices and were skillful in getting control and had an absolutely perfectly working agreement, that is the sort of front I would put up. I think also that those phenomena and maneuvers themselves, in that form, indicate a very free industry in which agreement was completely absent.

Economists are agreed that in the case of a uniform standard article, perfect competition results in price uniformity as between all sellers who are selling that article in the same market at the same time, assuming that it is open in the sense that the buyers are informed of the prices of the various sellers and it is only on that assumption that in the economist's belief uniform prices will result and that competition will be wholesale and salutary. I know of no dissent from the opinion, among recognized economists, that [fol. 1920] free and economic competition,—presupposing such open prices and terms are known to buyers and sellers,—will produce such uniformity of price.

As an economist I emphatically condemn the practice of secret allowance and price discrimination and rebates. I have in mind particularly the kind of discrimination that results from secrecy. I condemn it in the first place because I think it interferes with the normal operations of supply and demand in the sense that the economist believes that supply and demand thus operating fix prices. I condemn it because I think in the long run it necessarily increases the cost of industry. If a dealer or a producer makes an open price reduction and everybody knows about it, almost inevitably in a short time all buyers get the benefit of it, so that the reduction spreads throughout the mass of buyers generally. If he makes it secretly, only to a few, then only a class of favored buyers get it. I object to it particularly, that is, to secret price discrimination, because I had considerable experience as a young man in a business in which secret price-quoting and discrimination were rife. I quit that business with a very deep conviction that you cannot stay in a trade and keep honest if you are giving secret price discriminations. As far as my ex- [fol. 1921] perience goes and my subsequent observation, it necessarily involves lying and deceit. I think that has been a really material element in the formation of economists' opinions on this subject.

I know of no difference of opinion among recognized economists as to the economic undesirability of these secret price discriminations and allowances. I can see a difference between ethical considerations and economic considerations but I think the businessman among other things is motivated by ethical considerations and I think they have a very wide place in economic conclusions. Economists have with singular unanimity recommended or endorsed what we briefly call "open competition" and they have endorsed that partly, not wholly, because the granting of secret discriminations involve deceit and falsehood. I do not think any of them have taken any stand against all discriminations.

Whether an agreement among the producers not to give quantity discounts is interfering in any way with the operation of true and economic competition depends upon whether the quantity discount genuinely reflects a reduction in cost or does not. The mere adoption as part of the Code of Ethics, of a resolution, as it were, not to give quan-

[fol. 1922] tity discounts would be wholly authorized by the principals of economics in my opinion if in that trade or industry a quantity discount would not reflect some corresponding reduction in cost.

If in an industry the sale of goods in larger quantities enables you to make some saving in cost, such a practice is not only justified but it is natural and will be inevitable. If, on the other hand, quantity discounts do not enable you to reduce costs, in the long run the people who do not get quantity discounts must pay up for the discount which is given to the man who makes purchases in large quantities. In the reasoning of the economist, that necessarily involves in the long run extra prices for the small purchaser in order to make possible reductions to large purchasers. While I have no offhand prejudice against the large purchaser or the large producer, I object to any commercial practice which in the long run gives a preference to the large buyer as opposed to the small buyer.

If the giving of a reduction on quantity purchases enables a vast increase in production and in sales and therefore a reduction, solely from that standpoint, of overhead cost, a quantity discount is thoroughly justified.

[fol. 1923] I think that is a situation which prevails in the public utility industry in the sale of power—that they are conceding a low rate to consumers in very large quantities—and it is thoroughly justified for very obvious reasons. I think, however, it is different in an industry where the circumstances are such that it is highly probable that the giving of discounts in larger quantities enables no corresponding reduction to be made in the cost. I think industries differ in that respect greatly.

If you have a commodity like sugar where the elasticity is small, a sale in a large quantity frequently enables no corresponding cost reduction to be made. You do not sell an increased quantity of sugar, as an industry, merely by selling some of it in large quantities.

If in the experience of an industry or a group of men or, particularly in the experience of an old producer in industry, he becomes convinced that as a matter of policy he gets no more business with a quantity discount than without it, I think that man is perfectly justified in agreeing with a group of other men in undertaking an agreement not to give quantity discounts. By "perfectly justi-

fied" I mean by the economic and not legal test. I believe, furthermore, that such a resolution is sound for the indus-
[fol. 1924] try and sound for the consumer, as based upon economic thinking on this subject. If, per contra, the giving of a quantity discount enables a producer in the long run or the industry as a whole in the long run to get business that they would not otherwise get, it is a good thing and thoroughly justified.

Price very frequently, perhaps ordinarily, may be and will be lower if the volume of sales is larger than if it is smaller. This reduction ordinarily or frequently has no relation to and bears no relation to the large and small sales, and the sales made in small quantity or volume have as much responsibility for the reduction as those made in large volume. In general I should say that no preference should be given to the large or small sales in crediting them with responsibility for the price reduction.

Now it frequently happens that either large sales or some particular class of sales may logically be credited with the increase in volume which enables the price to be reduced. In that event it is entirely proper to make such price classification or to introduce such quantity discounts as give to that purchaser who enables the price reduction permanently to be made the credit therefor.

[fol. 1925] If there were a large new purchaser, representing a new process which required the production at a cheaper price and which could not be used otherwise and which represented an entirely new outlet for the industry, that would be a circumstance which would justify a special price to that class of purchasers.

Freight absorptions are decidedly no evidence of restricted competition. Such practices under the conditions as before stated are evidence of free competition. The practice or existence of uniform shipping point prices combined with freight absorption, in my opinion as an economist, is compatible with competition. A system of shipping point prices combined with some freight absorptions is a natural, normal and probably the most prevalent system among American manufacturers in industry where competition is free and economic. There is no economic tendency under such a system of practice which would operate to prevent price reduction at the shipping point, that is, to prevent reduction of base prices.

I have studied Exhibit E-17 headed "Statement of Average Capital Employed Before Deducting Reserves for Depreciation and Income Taxes and Profits Earned Before [fol. 1926] and After Charging Off Depreciation, Income or Other Corporate Taxes for the Years 1925 to 1931.". I see nothing in these figures contained in this Exhibit to indicate the absence of normal competition.

Exhibit (533) shows the increase in the average yearly profit for the 3 years 1925, 1926 and 1927 contrasted with the 3 years 1928 to 1930. It shows an average yearly profit in the first period of $7,124,000 for the industry and an average yearly profit for the second period of $15,052,000. Those figures, as I have read them, necessarily mean nothing because I know nothing about the increase of capital at stake and the investments in the industry.

I cannot reconcile these figures because we have the capital for each year, the profits for each year and an average which remains quite normal. The amount of increase means nothing because your basis was abnormally low.

If these figures are correct and the capital for each year is given, the profits for that year and the resulting rates of profit are uniformly low, not only reasonably so but reasonably by margins so wide that with a very considerable amount of mistake in the figures a very large element of error might be found and they would still be below the average rate of profit earned in industry generally. [fol. 1927] Now you show me what seems to be a startling increase of profit and I really and genuinely cannot tell anything about that because I do not know what you are starting from. The industry may have been earning 2% or 1% or making some loss in the first year. Suppose it was making only 1% in three years and then made 6%. That will show that it has increased six times and nevertheless will be normal all the time, at least not above normal.

I am now speaking with respect to the percentage of profits which result by dividing profit or loss after charging depreciation and Federal income taxes by average capital after deducting reserves for depreciation, income and other corporate taxes. All that means that I am selecting the third comparative statement here and I think what I say would be generally true on the other bases.

These figures show for the 3 years, 1925 to 1927, the following average rate of profit: for the year 1925, 2.78% for 1926, 7.65%, for 1927 a deficit of .12 of 1%. Now the average for those 3 years would be very low. It would be greatly reduced by that abnormal year of loss in 1927 and by the very low year 1925. The average of those 3 figures would be about 3%.

I read again the similar yearly averages for the later years: 1928, 7.64%, 1929, 7.39%, 1930, 5.72%, 1931, 5.58%. [fol. 1928] Let us assume that the average for those years is 6%. Now, therefore, if you compare the average for the first 3 years and find it is 3% on the capital and then find that the average for the last 4 years is 6% on the capital, you have an increase of 100%, all of it within the range of quite reasonable profit.

I find no evidence in it whatever of a concert of action. There may be good evidence in it of the stabilizing effect of the kind of competition that prevails in the sugar business.

Increased profits might result from either successful concerted action or successful operation of economic competition. The existence of economic competition with a suppression of undesirable forms of competition might easily have the effect of stabilizing profits or increasing profits under certain circumstances. I would expect sound economic competition to do that, to eliminate [illegible]able forms of competition.

Stabilized profits or increased profits are quite compatible with agreement. I should expect free competition accompanied by the elimination of undesirable forms of competition to strengthen profits in an industry if it started with a profit range of less than 3%.

There are things like cigarettes, sugar or coffee, a variety [fol. 1929] of other articles, that are likely to stand up, other things being equal, in a depression. That fact alone, whether there were combination or not, would tend to give the cigarette industry a more favorable showing in times of depression than the generality of industries. The food manufacturing industries would show a higher range of profits generally, a more favorable movement, during the period covered by these figures, 1925 to 1931.

I base the statement that these figures represent reasonable profits and rather a low range of profits principally

upon this evidence: Figures showing the ratio of profit to invested capital were obtained and published by the Treasury Department for the years 1919 to 1921, thus giving us a wide range of profit statistics for the year 1921. They are Government figures covering a very wide range.

In my opinion, in a period of depression the average normal rate of return for the entire body of concerns making any money at all, meaning manufacturing industries, is above, rather than less than 10%.

Defendants' Exhibits L-10 and U-17 were marked for identification.

[fol. 1930] The following Defendants' Exhibits were received in evidence:

(3237) R-1	(5643) C-4
(5639) Z-3	(5645) D-4 and E-4
(5640) A-4	(5791) F-4
(5660) B-4	(7275) Z-5

Petitioner's Exhibit 484 was received in evidence.

The following Defendants' Exhibits were received in evidence:

(7530) F-6	(7542) I-6
(7534) G-6	(7617) J-6
(7536) H-6	

Petitioner's Exhibits 488 and 494 were received in evidence.

The following Defendants' Exhibits were received in evidence:

(8517) K-7	(8522) M-7 and N-7
(8519) L-7	(8526) O-7

Defendants objected to the admission of Exhibit 495 because it was not the opinion of Defendants' counsel and Defendants had not offered any opinion by counsel regarding the circulation of freight applications by the Institute, and because it was irrelevant and immaterial. The objection was overruled and an exception taken.

Petitioner's Exhibits 495, 496 and 502 were received in evidence.

Petitioner's Exhibit 503 was marked for identification.

Petitioner's Exhibit 504 was received in evidence.

Defendants' Exhibit Y-8 was received in evidence.

[fol. 1931] Petitioner's Exhibits 506 to 508, inclusive, were received in evidence.

The following Defendants' Exhibits were received in evidence:

( ) P-9	(9767) S-9
( ) Q-9	(9914) B-10
(9762) R-9	(9916) C-10

Petitioner's Exhibit 510 was received in evidence.

(Exhibit 510 was admitted with the understanding that it was only a statement of fact as to Revere's costs for two months and not as to the comparison of the Suchar process with the process employed by the other refiners.)

Petitioner's Exhibit 511 was received in evidence.

Defendants' Exhibit F-17 was received in evidence.

Petitioner's Exhibit 529 was received in evidence.

(Petitioner's Exhibit 521 was received in evidence as part of the opening statement made by counsel for Defendants and for no other purpose. After a statement by counsel for Defendants at the time of its introduction in evidence the substantial errors in the figures thereon had subsequently been discovered.)

Petitioner's Exhibits 530, 532 and 533 were received in evidence.

Defendants' Exhibits S-17 and T-17 were received in evidence.

Petitioner's Exhibit 531 was received in evidence.

All the minutes of the Institute which had not already been received in evidence were offered by Defendants' counsel and received in evidence.

[fols. 1933 & 1934] In United States District Court

[Title omitted]

Order Approving Statement of Evidence

The statement of evidence in narrative form, prepared, lodged and submitted by appellants for approval, a copy

of which is attached hereto, is hereby approved as being a true, complete and properly prepared statement of the evidence received on the trial of this cause and relevant to the questions presented on the appeal.

The additional statement of evidence in narrative form, attached to "Appellee's Praecipe for Additional Portions of the Record" and the exhibits of appellee and appellant designated in said Praecipe of appellee are certified to be correct but are not to be included in the transcript of the record on appeal, said statement and exhibits not being essential to the decision of the questions presented by the appeal.

Dated, New York, July 3, 1935.

Julian W. Mack, Circuit Judge.

[fols. 1935 & 1936] In United States District Court

[Title omitted]

Stipulation Regarding Accuracy of Narrative Statements

It is hereby stipulated and agreed by and between the parties hereto:

1. That the narrative statement lodged by the appellants with the Clerk of the District Court is a correct narrative of the testimony which it purports to cover.

2. That the narrative statement attached to appellee's Præcipe requesting the inclusion of additional portions of the record is a correct narrative of the testimony which it purports to cover.

3. That neither party waives its objection to the immateriality or incompleteness of the narrative statement submitted by the other party.

Sullivan & Cromwell, Solicitor- for Appellants, Walter L. Price, Solicitor for Appellee.

[fol. 1937] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 27, 1935

Come now the Appellants and adopt their Assignments of Error except Assignments of Error numbered 103, 104, 105, 106, 108, 109, 110, 111, 112, 113, 114, 115, 116, 119, 120, 122, 123, 125, 126 and 127, as their Statement of Points to be Relied Upon and represent that the whole of the Record, as filed, is necessary for the consideration of the case.

Appellants request that the whole of the Record, as filed, with the exception of Appellants and Appellee's Exhibits, be printed and that Appellants and Appellee's Exhibits, although constituting part of the Record on Appeal, be not printed.

Dated, New York, July 23, 1935.

Sullivan & Cromwell, Solicitors for Appellants.

To—

Honorable Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

United States of America, Appellee.

Honorable Stanley Reed, Solicitor General of the United States, Solicitor for Appellee, Department of Justice, Washington, D. C.

Service of the foregoing Statement and Designation and [fol. 1938] receipt of a copy thereof this 25 day of July, 1935, is hereby admitted and acknowledged.

Stanley Reed, Solicitor for Appellee.

[fol. 1939] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 8, 1935

Comes now the Appellee and requests that, in addition to the parts of the Record designated for printing by Appellants, Appellee's exhibits be printed with the exception of the following, which may be omitted from the printed record, provided the explanations hereinafter set forth are included in the printed record:

1 to 27, inc.
50–55, inc.
77–82, inc.
84–85, inc.
88–92, inc.
105
110
113
191
197 (omit agreement only)
201
202 (omit pledges only)
206–207
215–216
259
262
268
269
275
280–282, inc.
295
297
300
303C
308
309A
309G
309J
323
323A
338
341
341A
348–348–E, inc.

[fol. 1940]

355
366C
374A
374B
379–382, inc. (omit all except 1st 3 pages of each exhibit).
383
391I
391L
391M
391Q
391S
391T
391X
391Z
391AA
391CC,
391DD
391KK
391LL
391TT
391UU
391WW
391XX
419T (omit list only)
419L1–419N1, inc.
419P1
419Y1
419Z1
419J2
419L2 (omit list only)
419M2 (omit list only)
419L3
419M3
419U3 (omit list only)
420A
420C
420J
420K3
422
424
424B
424C
424F
431E
431P (omit brokers' list only)
431Q (omit brokers' list only)
438D
438F

391BBB
391GGG
391HHH
391SSSS
391VVVV
391WWWW
391YYYY
400J
400C1
400H1
400K1–400Q1, inc.
400J2
400K2
400I3
407H–407L, inc.
408D
409B
410
410A
413A
419C
419I
419K
419L (omit list only)
419M (omit list only)
419N

[fol. 1941]

452H (omit rate schedules only)
452Q
452Z
452A1
452D1
452F1
452I1
452X1
452Z1
452A2
452F2
452N2
452P2
453
455A
438K–438M, inc.
438R–438T, inc.
438W
438Z
438D1
438F1
438G1
438O1
438Q1
440
441G–441I, inc.
442O1
442P1
443G1–443D3
446–446E, inc.
447B
447S
447I1
447J1
447K1
448
451T
451T1
451U1
451A2
451D2
456Q
459J
459R1
461B
465
466
470A
479A
480
488A
489B
489H
490G–490K, inc.
506B–506F, inc.
507–508H

455C	509
455E	510
455F	512–526, inc.
455Y	529
456I–456N, inc.	531
	534–537, inc.

[fol. 1942] Appellee further requests that the following explanation be printed in the Record at the point of omission of the exhibits to which they refer:

Explanation 1

Exhibits 1-6, inc. (filed with the Clerk of the Supreme Court in lieu of printing) are annual reports of American Refining Company containing statistical charts compiled from data supplied by Willett & Gray.

Explanation 2

Exhibit 9 (filed with the Clerk of the Supreme Court in lieu of printing) is a report of the United States Tariff Commission to the President containing statistical charts compiled from data supplied by Willett & Gray.

Explanation 3

Exhibits 50-55, inc. (filed with the Clerk of the Supreme Court in lieu of printing) are announcements, identical in language and date with Exhibit 49, by Arbuckle, Federal, Godchaux, National, Pennsylvania, and Revere to Edgar.

Explanation 4

Exhibits 77, 79, 81, 88, 90, and 92 (filed with the Clerk of the Supreme Court in lieu of printing) are letters similar to Exhibits 75 and 86, from the Institute to Henderson, Arbuckle, Revere, Texas, Pennsylvania, and National inquiring concerning brokers' pledges' from brokers used by these refiners. Exhibits 78, 80, 82, 83, 89, and 91 are replies of these refiners to the Institute, and are similar to Exhibit 76.

Explanation 5

The agreement referred to in Exhibit 197 (filed with the Clerk of the Supreme Court in lieu of printing) is identical with the non-rebating agreement contained in Exhibit 196,

except for the substitution of Godchaux for American as party thereto.

Explanation 6

Exhibit 202 (filed with the Clerk of the Supreme Court in lieu of printing) consists of brokers' pledges of McCahan, Godchaux, Pennsylvania, National, Revere, Spreckels, Arbuckle, American and Franklin, executed by Edgar in March, 1930. These pledges are identical with that contained in Exhibit 70 except as follows:

[fol. 1943] 1. In the pledges of McCahan and Pennsylvania, the time of notice in the final paragraph referring to termination of the pledge is not designated.

2. In the pledges of Spreckels and Arbuckle, the final paragraph referring to the termination of the pledge, is omitted.

3. In the pledge of National, in lieu of the final paragraph referring to termination of the pledge the following is substituted:

"(2) The Refiner agrees to pay the Broker brokerage commissions monthly for all sugar, syrup and/or other products accepted at destination by customers during the preceding month under orders submitted by the Broker and accepted by the Refiner. These commissions shall be at rates arranged for from time to time between the Refiner and the Broker. Such brokerage commissions shall in no event be regarded as earned or payable if, for any reason, the goods are not actually accepted at destination by the customer.

"It is understood and agreed between the Broker and the Refiner:

"(1) That the Refiner's regular printed forms in effect at the time shall be used for all orders and specifications submitted by the Broker and the Broker will use, fill in, handle and forward these forms, and have them signed in accordance with the Refiner's instructions in effect at the time.

"(2) The Refiner shall have the right to discontinue its relation with any Broker, at any time, and in any event to reject any or all orders which the Broker may submit."

4. In the pledges of American and Franklin, in lieu of the final paragraph referring to termination of the pledge, the following is substituted:

"The Refiner and the Broker further agree as follows:

"(a) That in soliciting, receiving and forwarding orders for the Refiner's sugar, syrup and/or other products, and in all of the Broker's relations with customers and with the public, the Broker will describe itself only as a broker or merchandise broker in indicating the Broker's status with reference to the Refiner and the latter's customers.

"(b) That the Refiner's regular printed forms in effect at the time shall be used for all orders and specifications submitted by the Broker, and that the Broker will use, fill in, handle and forward these forms, and have them signed, in accordance with the Refiner's instructions in effect at the time.

[fol. 1944] "(c) That the Broker will not make any representation or statement, or enter into any arrangement or agreement, concerning the time for making delivery or furnishing specifications under orders entered, or to be entered, with the Refiner, or concerning terms of payment under such orders, or concerning any other matters in connection with such orders or the Refiner's relation with customers under these orders, except as definitely authorized by the Refiner and in accordance with the printed provisions contained in the Refiner's regular order forms and specifications forms.

"(d) That the Broker will not in any instance, unless definitely authorized by the Refiner to do so, release to customers any sugar, syrup and/or other products owned or shipped by the Refiner, or the papers representing such goods, without prior payment in full in actual cash or by certified check on a responsible bank; and that, in the event of the Refiner incurring any loss by reason of the Broker's failure to comply with this provision, the Broker will compensate the Refiner promptly in full for the amount of such loss.

"(e) The Refiner shall have the right to discontinue its relations with the Broker at any time, and in any event to reject any or all orders which the Broker may submit.

"(f) The Refiner agrees to pay the Brokerage commissions monthly for all sugar, syrup and/or other products accepted at destination by customers during the preceding month under orders submitted by the Broker and accepted by the Refiner. These commissions shall be at rates arranged for from time to time between the Refiner and the Broker. Such brokerage commissions shall in no event be regarded as earned or payable if, for any reason, the goods are not actually accepted at destination by the customer."

Explanation 7

Exhibits 206 and 207 (filed with the Clerk of the Supreme Court in lieu of printing) are telegrams dated December 18, 1930, from National and American, to Edgar, identical with Exhibit 205.

Explanation 8

Exhibit 262 (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram, dated May 3, 1929, from Pennsylvania to Edgar identical with Exhibit 261.

Explanation 9

Exhibit 268 (filed with the Clerk of the Supreme Court in lieu of printing) is an announcement, dated July 11, 1930, by Edgar to its brokers identical with Exhibit 266.

Explanation 10

Exhibits 280 to 282, inc. (filed with the Clerk of the Supreme Court in lieu of printing) are announcements to the trade, dated February 4, and 6, 1930, by Spreckels, American and National identical with Exhibit 279.

[fol. 1945] Explanation 11

Exhibit 308 (filed with the Clerk of the Supreme Court in lieu of printing) is a telegraphic announcement by American to Edwin R. Mayer, dated January 7, 1928, identical with Exhibit 117.

Explanation 12

Exhibit 341A (filed with the Clerk of the Supreme Court in lieu of printing) is a letter from Lowry & Company to National containing comments on the proposed brokers

pledge requested by the Institute in Exhibit 341 (to be filed with the Clerk of the Supreme Court in lieu of printing). The following is an excerpt therefrom:

"First: The Agreement we would make would be with National Sugar Refining Company, as a firm or corporation, not with them as 'Members of the Sugar Institute, Inc.' We are not interested in what organization you belong to any more than you are interested in any organization we may belong to."

Explanation 13

The excerpts from the Minutes of the Directors Meeting of January 16, 1930, contained in Exhibit 366C (filed with the Clerk of the Supreme Court in lieu of printing) and referred to in Exhibit 366B are the minutes in Exhibits 21-26, beginning with the topic "Non-Rebating Warehouse Agreements," page 368, and ending with and including the topic "Brokers Handling Foreign Sugar," pp. 373-374.

Explanation 14

These are three typical sheets from Exhibit 379 (filed with the Clerk of the Supreme Court in lieu of printing), a loose-leaf notebook of selling terms and freight selling bases supplied by the Institute to all members.

Explanation 15

These are three typical sheets from Exhibit 380 (filed with the Clerk of the Supreme Court in lieu of printing), a loose-leaf notebook of Consignment Points, Reconsignment Points, Reconsignment Warehouses, and Ports of Entry supplied by the Institute to all members.

Explanation 16

These are three typical sheets from Exhibit 381 (filed with the Clerk of the Supreme Court in lieu of printing), a loose-leaf notebook containing lists of Brokers approved by the Institute and supplied by it to all members.

Explanation 17

These are three typical sheets from Exhibit 382 (filed with the Clerk of the Supreme Court in lieu of printing),

a loose-leaf notebook containing lists of Warehouses approved by the Institute and supplied by it to all members.

Explanation 18

Exhibit 391I (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Henderson, dated May 4, 1929, identical with Exhibit 291B.

[fol. 1946]

Explanation 19

Exhibit 391L (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Henderson, dated May 7, 1929, identical with Exhibits 391F.

Explanation 20

Exhibit 391M (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Henderson, dated May 7, 1929, identical with Exhibit 391-G.

Explanation 21

Exhibit 391Q (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Texas, dated May 3, 1929, identical with Exhibit 391B.

Explanation 22

Exhibit 391S (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Texas, dated May 7, 1929, identical with Exhibit 391E.

Explanation 23

Exhibit 391T (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Texas, dated May 7, 1929, identical with Exhibit 391F.

Explanation 24

Exhibit 391X (filed with the Clerk of the Supreme Court in lieu of printing) is a letter from American to Willett & Gray, dated May 3, 1929, identical with Exhibit 391.

Explanation 25

Exhibit 291Z and 391AA (filed with the Clerk of the Supreme Court in lieu of printing) are telegrams from

American to its brokers in Evansville, Ind., and Detroit, Mich., dated May 2, 1929, identical with Exhibit 391Y except as to the warehouses disqualified.

Explanation 26

Exhibits 391CC and 391DD (filed with the Clerk of the Supreme Court in lieu of printing) are telegrams from American to the Akron Grocery Co., Akron, Ohio, and The Berden Company, Tolédo, Ohio, dated May 2, 1929, identical with Exhibit 391Y, except as to the warehouses disqualified.

Explanation 27

Exhibit 291TT (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from Pennsylvania to its brokers, dated May 2, 1929, identical with Exhibit 391.

[fol. 1947] Explanation 28

Exhibit 391UU (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Pennsylvania dated May 3, 1929, identical with Exhibit 391B.

Explanation 29

Exhibit 391WW (filed with the Clerk of the Supreme Court in lieu of printing) is an announcement by Arbuckle to its brokers, dated May 3, 1929, identical with Exhibit 391.

Explanation 30

Exhibit 391XX (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from Oxnard of Savannah to Pardonner of Savannah instructing him to send telegram to all brokers, dated May 2, 1929, identical with Exhibit 391.

Explanation 31

Exhibit 391BBB (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Savannah, dated May 3, 1929, identical with Exhibit 391B.

Explanation 32

Exhibit 391HHH (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to McCahan, dated May 7, 1929, identical with Exhibit 391G.

Explanation 33

Exhibit 391SSSS (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from Colonial to its brokers, dated May 6, 1929, substantially identical with Exhibit 391.

Explanation 34

Exhibit 391VVV (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from Colonial to the Alabama Brokerage Co., Bessemer and Tuscaloosa, Ala., the Walters & Weir Brokerage Co., Birmingham, Ala., and the Watson Brokerage Co., Mobile, Ala., dated May 8, 1929, identical with Exhibit 391UUUU.

Explanation 35

Exhibit 391WWWW (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Savannah, dated May 7, 1929, identical with Exhibit 391G.

Explanation 36

Exhibit 400J (filed with the Clerk of the Supreme Court in lieu of printing) is a letter from Revere to the Institute, dated September 10, 1929, supplying the information requested by the Institute in Exhibit 400I.

[fol. 1948] Explanation 37

Exhibits 400K1 to 400Q1, inc. (filed with the Clerk of the Supreme Court in lieu of printing) are identical with Exhibit 400J1, except as to the warehouses disqualified.

Explanation 38

Exhibits 400J2 and 400K2 (filed with the Clerk of the Supreme Court in lieu of printing) are substantially identical with Exhibit 400I2, except as to the warehouses disqualified.

Explanation 39

Exhibit 419I (filed with the Clerk of the Supreme Court in lieu of printing) is the list of Revere, referred to in Exhibit 419H, showing contract balances on which the thirty day period had expired.

Explanation 40

Exhibit 419K (filed with the Clerk of the Supreme Court in lieu of printing) is the list of Revere, referred to in Exhibit 419J, showing balances due on contracts booked February 24th and 25th, 1928.

Explanation 41

Exhibit 419N (filed with the Clerk of the Supreme Court in lieu of printing) is a list of brokers to whom Exhibit 419M was addressed.

Explanation 42

Exhibits 419L1 and 419M1 (filed with the Clerk of the Supreme Court in lieu of printing) are letters from Franklin and American to their brokers, dated July 1, 1929, identical with Exhibit 419C1.

Exhibit 419N1 (filed with the Clerk of the Supreme Court in lieu of printing) is a list of brokers to which Exhibits 419M1 and 419L1 were addressed.

Explanation 43

The Resolution of the Board of Directors of July 9, 1929, set forth in Exhibit 419P1 (filed with the Clerk of the Supreme Court in lieu of printing) and referred to in Exhibit 419O1, is taken from the Minutes of the Directors' Meeting (Exhibits 21-26), page 266.

Explanation 44

Exhibit 419Y1 (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Pennsylvania, dated August 20, 1929, identical with Exhibit 417.

Exhibit 419Z1 (filed with the Clerk of the Supreme Court in lieu of printing) is an announcement by Pennsylvania, dated August 21, 1929, identical with that proposed by the Institute in Exhibits 417 and 419Y1.

[fol. 1949] Explanation 45

Exhibit 419L3 (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from Henderson to the Institute listing the unspecified balances as requested by the Institute in Exhibit 419K3.

Explanation 46

Exhibit 419M3 (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from the Institute to Revere, dated May 2, 1930, identical with Exhibit 419I3.

Explanation 47

Exhibit 424 (filed with the Clerk of the Supreme Court in lieu of Printing) is an announcement by Western to Meinrath Brokerage Co., dated May 3, 1929, identical with Exhibit 391.

Explanation 48

Exhibit 424B (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram by National to its brokers, dated May 2, 1929, identical with Exhibit 391.

Exhibit 424C (filed with the Clerk of the Supreme Court in lieu of printing) is a telegram from National to Edgar, dated May 4, 1929, identical with Exhibit 291UUU.

Explanation 49

Exhibit 438Q1 (filed with the Clerk of the Supreme Court in lieu of printing) is excerpts from the minutes of the Executive Committee Meetings at which this case was discussed which may be found in Exhibits 21-26, as follows:

1. Executive Committee Meeting of Jan. 8, 1931, p. 596.
2. Executive Committee Meeting of Jan. 22, 1931, p. 601.
3. Executive Committee Meeting of Jan. 28, 1931, p. 604.
4. Executive Committee Meeting of Feb. 5, 1931, p. 621.
5. Executive Committee Meeting of Feb. 13, 1931, p. 623.
6. Executive Committee Meeting of Feb. 19, 1931, p. 627-629, inc.
7. Executive Committee Meeting of April 9, 1931, p. 643.
8. Executive Committee Meeting of April 30, 1931, p. 647.
9. Executive Committee Meeting of May 14, 1931, p. 651.
10. Executive Committee Meeting of May 21, 1931, p. 659.

Explanation 50

Exhibit 447I1 (filed with the Clerk of the Supreme Court in lieu of printing) is a list of consignment points recommended by the Domestic Sugar Bureau.

Explanation 51

Exhibit 455C (filed with the Clerk of the Supreme Court in lieu of printing) is an announcement to the trade by American, dated April 29, 1929, identical with Exhibit 455.

[fol. 1950] Explanation 52

Exhibit 455Q (filed with the Clerk of the Supreme Court in lieu of printing) is an announcement to the trade by National, dated December 14, 1929, identical with Exhibit 456E.

Explanation 53

Exhibit 507 (filed with the Clerk of the Supreme Court in lieu of printing) is a contract dated June 15, 1932, for the sale by National to Berko Malted Milk Company of 2,500 bags of sugar at 3.70. Exhibits 508 to 508H, inclusive (filed with the Clerk of the Supreme Court in lieu of printing) are documents showing a resale of 700 bags of this sugar by Berko Company to the A. & P. Stores on August 24, 1932, at 4.05, National aiding in making the resale and permitting the sugar to be delivered at Auburn.

Appellee further requests that the narrative statements, exhibits, and stipulations designated in Appellee's Praecipe and Supplemental Praecipe be printed.

Stanley Reed, Solicitor General, Angus B. MacLean, Asst. Sol. Gen'l, Walter L. Rice, Spec. Ass't to Atty. Gen., Solicitors for Appellee.

To—

Honorable Charles Elmore Cropley, Clerk of the Supreme Court of the United States.

Sullivan & Cromwell, 48 Wall Street, New York City, Solicitors for Appellants.

Service of the foregoing Designation, and receipt of a copy thereof this 7th day of August, 1935, is hereby admitted and acknowledged.

Sullivan & Cromwell, Solicitors for Appellants.

[File endorsement omitted.]

Endorsed on cover: File No. 39,822. S. New York, D. C. U. S. Term No. 268. The Sugar Institute, Inc., The American Sugar Refining Company, Margaret A. Jamison, et al., Appellants, vs. The United States of America. Filed July 22, 1935. Term No. 268 O. T. 1935.

ERRATA

On page 385, at the end of the first full paragraph, insert the following:

I am not sure that I would not have extended the plan of used bag allowances to other manufacturers besides the National Biscuit Company had we continued the management with the Pennsylvania because the thing in itself has some merit. It is a question of judgment. I always like savings and where savings can be effected without costing anybody anything, I think it is a good thing to do. I do not think our arrangement with National Biscuit Company could be done satisfactorily, generally. It was a very special arrangement and the only one of the sort we had.

On page 387, in lieu of the last two sentences of the second full paragraph, insert the following:

I don't think that the Institute had at that time issued any regulations with regard to shipments of that sort or that a sale of sugar f. o. b.—later on they made a ruling prohibiting the sugar from being sold f. o. b.

X Q. You say "they"; do you not mean to say the Institute did?

A. My understanding was that they did, yes.

X Q. Is there anything definite to base that understanding on?

A. Well, certainly at a given time, all refiners stopped selling f. o. b.

X Q. Now, your idea is, then, that at some time in 1929 all of the refiners stopped selling any sugar f. o. b. no matter where it was destined for?

A. That is my understanding.

X Q. And your inference is that the Institute was responsible for that?

A. That also is my understanding.

X Q. Yes, and have you any definite Institute regulations or announcement of any sort upon which that understanding is based?

A. I believe there must be some, but I had no idea you wanted to question me on this point and so didn't look up the records.

X Q. But so far as your present testimony is concerned, it is based on a general impression about the Institute being responsible for it?

A. There is no question but what there was a point, a very definite point, where my organization all reported to me that refiners will not sell any more f. o. b.

X Q. And you instantly connected that with the Institute because the refiners had all stopped that, you say?

A. Well, there was a feeling that the refiners and the Institute were pretty close, yes.

X Q. Yes, but the refiners had individually, frequently done things that, to your knowledge, the Institute was not responsible for, have they not, since the Institute was organized?

A. The Institute was organized to prevent that, was it not?

X Q. To prevent what?

A. Well, to have these terms clearly defined.

On page 394, after the first full paragraph, insert the following:

X Q. Was anything said as to the purpose of adopting delivered prices in addition to what you have stated?

A. Oh, I think I have given the substance of it; it was that to start in with a base or standard price and add to that known delivery price carried out the principle of their Code of Ethics. I remember we had a long economic discussion as to whether standard or base prices were proper or not.

On page 394, in lieu of the last sentence of the fourth full paragraph, substitute the following:

The Judge said that the only way to conduct the sugar business was to have a standard open price, which necessarily meant a base price at the refinery, and then delivered prices to various parts of the country, and if that method be adopted properly, abuses would be prevented.

On page 441, in the second full paragraph the date "1926" should be "1828."

On page 550, after the second full paragraph, insert the following:

By Mr. Rice:

Q. Now, Mr. Weil, did you make any study of the raw sugar market prior to the formation of the Institute?

A. Yes, that is necessarily a part of our——

The Court: Now, are you going to prove by him that before it was formed they went up and down together and afterwards they did not?

Mr. Rice: Yes.

The Court: Well, there is no dispute about that, you do not have to prove the same thing again, that is cumulative.

On page 612, after the fourth full paragraph, insert the following paragraph:

He said he wanted to commence his work on Saturday and the Institute offices were not open on Saturday so I suggested he take a key and make himself at home. He was given access to all the files and records and correspondence and worked on Saturday and I think also on Sunday. From then on he was there off and on for months.

On page 719, the last sentence should read as follows:

I am on the Executive Committee and Chairman of the Budget Committee of the Interstate Commerce Committee of the National Industrial Traffic League and am admitted to practice before the Committee.

On page 733, after the first paragraph, insert the following:

X Q. What happened to the principle of Code 3(c) after delivered prices were adopted in 1929?

A. It is important we should have delivered prices so that Judge Ballou completely gave up the idea of trying to apply the principle of Code 3-C and it just fell, because I cannot remember of his ever having attempted to enforce it in any other case after delivered prices were announced.

Mr. Browning: At page 6035 of the record I asked the witness, "What happened to the transportation principle after this delivered price situation, which came in 1929?" The answer is reported as, "It is important we should have delivered prices so that Judge Ballou completely gave up the idea of trying to apply the principle of Code 3c," etc.

I can not find out how that answer was reported, and I have no recollection of it; but I am going to ask the witness if he made that reply.

The Witness: I did not intend to make that reply.

Q. What did you intend to say?

A. I think I said it is important to note that with the advent of delivered prices Judge Ballou's theory of Code 3(c) was entirely dissipated and he gave up further efforts at enforcing it.

On page 735, line 4, "refiners" should be "carriers."

On page 743, the last sentence of the first full paragraph should read as follows:

Refiners individually announced that they would sell in Texas on the basis of the New Orleans allrail rate, or Sugarland rate plus 17¢, whichever was lower.

On page 750, the third sentence of the second paragraph should read as follows:

In other words, the transit billing on eastern sugar must carry a 4¢ additional charge and substitution of billing or of sugar, which would defeat the carriers obtaining what they would have obtained on the direct shipment from Philadelphia to Lafayette, was an illegal substitution and impaired the integrity of the through rate.

On page 762, in the first sentence of the second full paragraph, "absorptions during pickups" should be "absorptions versus pickups."

On page 764, in the first sentence of the second full paragraph, "transit absorptions" should be "transit abuses."

On page 768, after the first paragraph, insert the following paragraph:

I happen to have a very close friend who is Traffic Manager of one of the large industrial alcohol companies and discussing the methods of distribution in that industry and also discussing with him the problems that we had, he sent to me a copy of the alcohol industry's freight selling bases. I cannot recall whether this was in 1928 or 1929. I studied the system in the alcohol industry myself when he sent me down these little booklets which showed the bases.

On page 791, after the first paragraph, insert the following:

I want to qualify my statement that I did not have any assurance by saying that some time in the previous year when this was being agitated at the Institute I do remember Mr. Stone who was an officer of the Spreckels Company, which was in the alcohol business and also a member of the alcohol institute, stating to me at that time that they had a system of delivered prices in the alcohol industry, but I never inquired into the details of it. I have never seen what the basis of it was, whether it was zoning or whether on specific rates, and my talk with Mr. Stone on that was six months or a year before I did anything. I had forgotten all about delivered prices after the letter from Sullivan & Cromwell until the announcement by Arbuckle which came to us out of a clear sky, but on receiving this announcement by Arbuckle I realized I had to do some constructive thinking.

On page 840, line 3, "April" should be "March."

On page 842, fourth full paragrgaph, "457-C-2" should be "457-E-2."

On page 846, third full paragraph, "475-C" should be "457-C" and "475-A-1" should be "457-A."

On page 869, first sentence should read as follows:

By "operation of the warehouse" I meant actual operation as distinguished from stock ownership.

On page 884, in lieu of the first sentence in the last paragraph, substitute the following:

I heard Judge Ballou discuss the zoning plan at an earlier time and I heard it discussed at one of the meetings of the Institute in the fall of 1929.

On page 945, after the last full paragraph, insert the following paragraph:

We never did definitely find out what was the nature or the amount of the concession which Spreckels gave the customer. The amount of the rebate which we gave the customer was arrived at within our own organization without any consultation with the customer as to the amount, or the method of computing the amount. Before actual

payment we made no statement to the customer that we were going to make the payment. I do not doubt that our sales department may have intimated to him that we were going to try to do something to meet the situation, but that information, if it did come, was after the period for which we issued the check.

On page 947, the first, second, third and fourth full paragraphs should be deleted and the following paragraphs inserted:

Mr. Stanton and I had been discussing what we could do to meet the competition of Spreckels. I have no doubt that he may have told the buyer as early as March that we were discussing the situation and trying to arrive at some decision.

By the Court: That is not in accordance to what you stated to me in answer to my questions, Mr. Place. I was trying to pin you down, as I am trying at this moment, to the earlier period. The impression that you left on my mind is quite contrary to the impression that you are now giving. I asked you long ago, when I was butting in, because I could not understand your answers, whether you were informed in any way at all about any intimations having been given to the other fellow or buyer along about the summer, and you answered me, no.

On page 964, in the last line, the figure "445,000" should be "45,000."

On page 1074, at the end of the first full paragraph, insert the following:

It was also called to my attention—this so-called Joseph Mesh transaction at Detroit—which I could not help but look upon as a more or less petty affair, but it was significant of the fact that the Edgar Company was not performing their functions as a broker with respect to our sugars in a proper manner.

On page 1075, after the first paragraph, insert the following:

Mr. Rice: Now, if your Honor please, I assume it is understood that this is not being taken as proof of the facts by this statement of Mr. Beebe?

Mr. McGratty: It is offered in proof of statements that Mr. Beebe made.

The Court: That is all, it is just proof of Mr. Beebe's statement.

Mr. Rice: What Mr. Beebe says, is not binding upon the Government in any way.

The Court: I will admit it anyway, whether it is binding on the Government or not, because I am going to give every one a full opportunity to present your case and to get the full statements of everything that happened in connection with these matters into the record. I will adopt the most liberal possible rule, Mr. Rice, on the question of what may be admissible or inadmissible. If it is inadmissible, then all the rest of it is simply argument and goes to the weight it is going to have.

On page 1075, before the last paragraph, insert the following paragraph:

The Court: Ex. L-9 may go in as showing good faith.

On page 1076, after the first full paragraph, insert the following:

Mr. McGratty: I offer Ex. M-9 in evidence.

Mr. Rice: For what purpose?

Mr. McGratty: For the purpose of showing good faith upon the part of the American Organization.

Mr. Rice: Good faith in doing what?

Mr. McGratty: In their whole course of relationship with the Edgar organization.

Mr. Rice: If your Honor please, the only good faith issue in this case, I believe, is the good faith of the defendants, if any, in forming the Institute and putting the rules of the Institute into operation. Now this memorandum was written in 1930, two and a half years after the Institute had started its operations.

Mr. Higgins: If your Honor please, one of the crucial issues in this case is the good faith of the defendants in putting into effect under the Institute this regulation separating brokerage from the other functions; and this shows in very definite and clear form just why——

The Court: It may go in.

Mr. Rice: Exception.

Mr. Fly: I assume the Court does not accept this as evidence of good faith on May 2, 1929?

The Court: No. I accept it as evidence of good faith as of the date that it is written; not as of a year preceding that.

On page 1076, after the third full paragraph, insert the following:

Mr. McGratty: We will offer Ex. N-9 only on the good faith point.

Mr. Rice: May I point out with regard to this good faith issue, your Honor: Good faith can be an issue in this case only if it is good faith in taking concerted action. Whatever the American might have done in this so far as this case is concerned, unless we have produced some evidence of concerted action taken by the defendants in regard to this transaction after this auditor's report has been received and then I do not see how it can have any possible bearing on this case.

The Court: Well, I am doubtful but I will let it go in.

On page 1077, after the first full paragraph, insert the following:

Mr. McGratty: I think we can withdraw Exhibit G-2 if we can stipulate this, that on March 29th, 1930 the Edgar organization sent to the American New Orleans office the D from C purporting to show the delivery by Edgar of consigned stock at Muscatine at a 4.70 basis price; that that D from C was subsequently cancelled by the American New Orleans sales office; that subsequent to that date the American New Orleans sales office prepared a series of D from C's on the basis of Mr. Weidman's report, showing purported delivery dates covering a period of eight months instead of a single delivery and aggregating more than 30 odd separate deliveries; that Edgar received these D from C's and paid on the basis of the amounts shown therein, such amounts being the prices prevailing on the dates that deliveries were purported to have been made as shown by Mr. Weidman's report.

Mr. Fly: I think this whole business is immaterial. That is the reason I felt so reluctant to let it go in, but if they think it is material, let it go in.

The Court: All right, let it go in.

Mr. Higgins: I think there should be added this detail, if Your Honor please: The Edgar D from C as made out on March 29, 1930 was on the basis price of 4.70; that that D from C's made up by the agreement and paid by Edgar were on basis prices that ranged from 4.95 to 5.50 instead of the 4.70 basis price on which Mr. Edgar first made the D from C.

On page 1078, after the fourth full paragraph, insert the following:

Mr. Rice: We assume this is not being taken as evidence of the fact. Mr. Stubbs commenced detailing a conversation between him and Mr. Beebe. Then he drifted off into a statement as to what the actual facts were.

Mr. Higgins: As to what Mr. Beebe said the facts were.

Mr. Rice: That is not being taken as evidence of the facts?

The Court: It cannot be evidence against you of what the facts are; it can be evidence of what Mr. Beebe told him. If there is any contradiction of what Mr. Beebe said, it is evidence to that extent. I don't remember whether there is or is not. That will be a matter of argument afterwards.

Mr. Rice: We simply want to be clear this is part of the conversation and nothing more.

The Court: I assume that is clear.

On page 1079, after the second full paragraph, insert the following:

Cross-examination.

By Mr. Rice:

Q. Immediately after the series of conferences beginning in March and ending in June, 1930, your relations with the Edgar organization became satisfactory to you and the American?

A. They became reasonably satisfactory.

Q. What do you attribute that to?

The Witness: My answer is this: That I am perfectly positive that as a result of the conferences to which I have referred, the entire Edgar organization knew that the American Sugar Refining Company and I meant what we said.

Q. That is what I thought. Did you take any concerted action along with your competitors to correct the alleged evils and irregularities in the Edgar organization after March, 1930?

A. I did not, and as far as I am aware, no one in our organization did.

Q. In other words, all of this action was entirely independent?

A. As far as I know, yes.

On page 1091, after the first paragraph, insert the following:

Mr. Rice: If your Honor please, we assume that none of this testimony is being taken as evidence of the existence of irregularities on the part of the Edgar organization?

The Court: Well, if you are going to compel them to produce all these documents, all right.

Mr. Higgins: The whole burden of Mr. Beebe's testimony was to try to make it appear that the Spreckels organization, particularly Mr. Stone and Mr. Harper, were participating with him in a scheme to provide customers with concessions and to defeat Spreckel's adherence to the Code of Ethics of the Institute. We certainly have a right to show the state of mind of the officials of the organization in transactions with Edgar. Mr. Beebe testified he did all those things under authority from Mr. Stone and Mr. Harper.

Mr. Rice: I agree thoroughly with the principles of law your Honor has stated. But here today and yesterday (Commencing with middle of page 1071 of Record) the defendants have devoted most of their time not to proving facts but proving——

The Court: Their own state of mind.

Mr. Rice: And I would like it understood that whenever hearsay testimony is given, that it is not accepted for the——

The Court: Proof of the facts.

Mr. Rice: Proof of the facts.

The Court: All right.

On page 1095, after the third full paragraph, insert the following:

Mr. Rice: If your Honor please, I want it understood that the testimony of this witness, similarly to the testi-

mony of the other witness, shall not be taken as evidence of the facts unless there is direct testimony of these facts.

The Court: Do you want them to produce the man to whom it was paid? Your objection is valid. I ask if you want them to produce the book or do you want him here in court?

Mr. Higgins: You want the books in court?

Mr. Rice: Yes, wherever you rely upon any facts I want the books here in court. We want sufficient information to check it up. Here the witness gave just a general conclusion.

On page 1095, after the fourth full paragraph, insert the following:

Mr. McGratty: I offer Exs. B-2 to P-2, B-9 and U-9 to A-10 in evidence as showing that the Spreckels organization was informed by the Merchants Storage Company in Milwaukee that approximately 1200 bags of Spreckels sugar at that point had been delivered during the months of October and December 1929, the report being received by Spreckels from the warehouse on January 8th, 1930, and that the Spreckels organization subsequently received an invoice from Edgar dated January 11, 1930 showing a sale of this quantity of sugar to the Great A. & P. Company at a basis price of five cents.

I offer them for the purpose of showing that the Spreckels organization requested a warehouse for a report showing the deliveries of stocks consigned to that warehouse in the care of Edgar as broker, as showing that when such report was subsequently furnished to the Edgar organization, the Edgar organization furnished an invoice—a single invoice covering all of the deliveries shown by the warehouse report—which invoice purported to show a delivery on January 11, 1930, to the Great A. & P. Tea Company at a basis price of five cents; and that the Spreckels organization subsequently received payment in accordance with this invoice.

On page 1096, after the second full paragraph, insert the following:

Q. And what, if anything, did Mr. Bagnall report to you?

Mr. Rice: I assume that all of this is going in on the question of good faith and not as proof of the fact.

Mr. McGratty: I am not eliciting this as proof of the fact there was a shortage.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 59-103

UNITED STATES OF AMERICA, Petitioner,

v.

THE SUGAR INSTITUTE, INC., et al., Defendants

ORDER APPROVING ERRATA TO NARRATIVE STATEMENT OF EVIDENCE

The attached Errata to the narrative statement of the evidence heretofore lodged by the appellants with the Clerk of the District Court having been presented to the Court, are hereby certified to be true and correct statements of portions of the evidence received in the trial of this cause.

Johann Mack, Circuit Judge.

New York, January 28, 1936.

Consented to: Angus D. MacLean, Special Assistant to the Attorney General. Sullivan & Cromwell, Counsel for Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 28th day of January in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States the One Hundred and Sixtieth.

Charles Weiser, Clerk. (Seal District Court of the United States, Southern District of N. Y.)

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., et al., Appellants,

v.

THE UNITED STATES OF AMERICA

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto that the attached "Errata" should be printed and incorporated in the record in the above case, and should be added to the end of Volume II of the printed record.

Angus D. MacLean, Special Assistant to the Attorney General. Sullivan & Cromwell, Counsel for Appellants.